No. 87-980-ASX
Status: GRANTED

Title: Mississippi Band of Choctaw Indians, Appellant
v.
Orrey Curtiss Holyfield, et ux., J. B., Natural Mother and W. J., Natural Father

Docketed:
December 15, 1987

Court: Supreme Court of Mississippi

Counsel for appellant: Smith,Edwin R.

Counsel for appellee: Miller,Edward O.

Note: Notice of appeal filed 12/14/87

Entry	Date	Note	Proceedings and Orders
1	Dec 15 1987	G	Statement as to jurisdiction filed.
3	Jan 22 1988		Order extending time to file response to jurisdictional statement until February 22, 1988.
4	Feb 24 1988		DISTRIBUTED. March 18, 1988
5	Mar 17 1988	F	Response requested -- TM, JPS.
6	Apr 13 1988		Order extending time to file response to jurisdictional statement until April 20, 1988.
7	Apr 20 1988		Motion of appellees Orrey C. Holyfield, et al. to dismiss filed.
8	Apr 27 1988		REDISTRIBUTED. May 12, 1988
9	May 3 1988	X	Reply brief of appellant MS Band of Choctaw Indians filed.
12	May 16 1988		REDISTRIBUTED. May 19, 1988
13	May 23 1988		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.
			**********
15	Jun 29 1988		Order extending time to file brief of appellant on the merits until July 30, 1988.
16	Jul 7 1988		Joint appendix filed.
18	Jul 28 1988	G	Motion of Navajo Nation for leave to file a brief as amicus curiae filed.
21	Jul 28 1988	G	Motion of Swinomish Tribal Community, et al. for leave to file a brief as amici curiae filed.
17	Jul 29 1988	G	Motion of Menominee Indian Tribe of Wisconsin for leave to file a brief as amicus curiae filed.
19	Jul 29 1988	G	Motion of Association on American Indian Affairs, Inc., et al. for leave to file a brief as amici curiae filed.
20	Jul 29 1988		Brief of appellant MS Band of Choctaw Indians filed.
22	Aug 10 1988		Record filed.
		*	Certified original record received.
23	Sep 15 1988		Motion of Navajo Nation for leave to file a brief as amicus curiae GRANTED.
24	Sep 15 1988		Motion of Menominee Indian Tribe of Wisconsin for leave to file a brief as amicus curiae GRANTED.
25	Sep 15 1988		Motion of Association on American Indian Affairs, Inc., et al. for leave to file a brief as amici curiae GRANTED.
28	Sep 30 1988		Order extending time to file brief of appellee on the merits until November 1, 1988.
26	Oct 3 1988		Motion of Swinomish Tribal Community, et al. for leave to file a brief as amici curiae GRANTED.

No. 87-980-ASX

Entry	Date	Note	Proceedings and Orders
29	Oct 24 1988		SET FOR ARGUMENT. Wednesday, January 11, 1989. (2nd case) (1 hr.)
30	Nov 1 1988		Order further extending time to file brief of appellee on the merits until November 30, 1988.
31	Dec 1 1988		Brief of appellees Orrey C. Holyfield, et al. filed.
32	Dec 8 1988		CIRCULATED.
34	Dec 12 1988		Lodging received. (10 copies).
35	Dec 23 1988	X	Reply brief of appellant MS Band of Choctaw Indians filed.
36	Dec 23 1988		Lodging received.
37	Jan 5 1989		Lodging received. (10 copies). (Publication).
38	Jan 11 1989		ARGUED.

87-980

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS,
Appellant,

v.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD,
J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,
Appellees.

On Appeal From the
Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

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December, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Do Mississippi Courts have Jurisdiction over adoptions of Indian children whose natural parents are residents of and domiciled on an Indian Reservation?

A. Does a state court requirement of physical presence within and parental consent to children's acquisition of their parents' residence and domicile unlawfully infringe upon the special federal/tribal relationship reflected in the ICWA when applied to Indian children of reservation parents?

B. Does the definition of residence or domicile of Indian children for purposes of the Indian Child Welfare Act turn on a state or a federal definition?

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TEXTBOOK AND OTHER:

IN THE

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NO. 87-

IN THE MATTER OF B.B. AND G.B., MINORS.
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ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD,
J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,
Appellees.

On Appeal From the
Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Mississippi, entered on August 5, 1987, rehearing denied, September 16, 1987, affirming the lower court's denial of appellant's motion to vacate and set aside a decree of adoption and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at 511 So.2d 918 (Miss. 1987) and is reproduced as an appendix to this Jurisdictional Statement.

GROUNDS ON WHICH THE COURT'S JURISDICTION IS INVOLVED

(i) The proceeding below was a state court adoption proceeding of twin Mississippi Choctaw Indian infants pursuant to Miss. Code Ann. sec. 93-17-3.

(ii) The decision of the court below was dated and entered on August 5, 1987. Appellant made a timely motion for rehearing, which was denied on September 16, 1987. Appellant's notice of appeal to this Court was filed on December 14, 1987, in the Supreme Court of Mississippi.

(iii) Appellant believes this Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1257(2). This matter is not free from doubt, and in the alternative, appellant prays that this Court treat this Jurisdiction Statement as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103[1]

(iv) The following cases are believed to sustain the jurisdiction:

Warren Trading Post Co. v. Arizona Tax Com'n, 380 U.S. 685 (1965)

[1] Regarding 28 U.S.C. § 1257(2), although the cases cited under (iv) *infra* were accepted by the Court as appeals, other Indian jurisdiction cases have been reviewed on certiorari, e.g., *Williams v. Lee,* 358 U.S. 217 (1959). See also *United States v. John,* 437 U.S. 634 (1978) where both appeal from the Supreme Court of Mississippi and certiorari to the Fifth Circuit Court of Appeals were granted on earlier consolidated Choctaw jurisdiction cases.

McClanahan v. Arizona Tax Com'n, 411 U.S. 164 (1973)

Tonasket v. Washington, 411 U.S. 451 (1973)

Ramah Navajo School Board, Inc., v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982)

(v) The validity of Miss. Code Ann. Sec. 93-17-3 (Supp. 1987) as applied in Indian adoptions is involved. The statute is set out in the Appendix A to this Jurisdictional Statement.

STATEMENT OF THE CASE

Appellant Mississippi Band of Choctaw Indians is a federally recognized Indian tribe in the State of Mississippi. On March 31, 1986 Appellant filed a Motion to Vacate and Set Aside the Final Decree of Adoption in a state adoption proceeding of twin Mississippi Choctaw infants by a non-Indian couple. Both the natural mother and the putative father are full-blood Mississippi Choctaw Indians enrolled at the federal Indian Agency at Philadelphia, Mississippi, and are residents of and domiciled on the Choctaw Indian Reservation. The adopting non-Indian parents reside in Harrison County, Mississippi about 200 miles south of tribal headquarters. Mississippi is a non-Public Law 280 State and the federal/tribal jurisdiction over the Choctaw Indian Reservation was recognized by this Court in *United States v. John,* 437 U.S. 634 (1978).

B.B. and G.B. are Choctaw Indians of the full blood and eligible for enrollment in the Mississippi Band of Choctaw Indians. They were born unto J.B., their natural mother on December 29, 1985 in Harrison County, Mississippi where the mother had travelled

to give birth.[2] A Consent to Adoption was executed by J.B. on January 10, 1986. The Consent to Adoption by the putative father, W.J., was executed on the 11th day of January, 1986, but was not certified by the Judge until June 3, 1986, long after the May 21st, 1986 hearing date on Appellant's Motion.

The Decree of Adoption was rendered on the 28th day of January, 1986.

Appellant Mississippi Band of Choctaw Indians, which had at no time been notified or served with process, filed its Motion to Vacate and Set Aside the Final Decree of Adoption on March 31, 1986. After the motion was filed and heard on May 21, 1986, another affidavit was given by the natural mother, J.B., and filed June 9, 1986. A Reaffirmation of Consent of Adoption was filed by W.J., putative father, on June 9, 1986. The Harrison County Chancery Court entered its Opinion overruling the motion on July 14, 1986, and a Decree was entered on July 30, 1986.

Appellant opposed the adoption petition filed by non-Indian Petitioners Orrey Curtiss Holyfield and Vivian Joan Holyfield in the Chancery Court of Harrison County, State of Mississippi by filing a Motion to Vacate and Set Aside the Final Decree of Adoption. Appendix B. The Motion asserted that the minor children of the natural mother residing on the Choctaw Indian Reservation were subject to the exclusive jurisdiction of the Mississippi Band of Choctaw Indians Tribal Court under preemptive federal law. Those laws were enacted to protect the tribe and its members

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[2] The Choctaw Health Center closed its obstetric unit in 1981 and since then Choctaw mothers have been routinely transferred off-reservation for childbirth.

from assertions of state jurisdiction concerning matters arising on the Choctaw Reservation. 25 U.S.C. § 1911(a).

After briefing and argument the Chancery Court for the First Judicial District of Harrison County, Mississippi decided it had jurisdiction to decide these adoption proceedings. Its judgment is set forth in Appendix C and its Opinion in Appendix D. The Court found that the Indian Tribe never obtained exclusive jurisdiction over the children because they were born outside the confines of and had never resided on or been physically on the Choctaw Indian Reservation.

Appellant prosecuted an appeal to the Supreme Court of Mississippi, which affirmed the adoptions and issued the Opinion reproduced in the Appendix E to this Jurisdictional Statement. Appellant maintained on appeal that federal statutes, i.e., The Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., the United States Constitution, Art. I, Sec. 8, cl. 3; and the laws of the United States established principles, which were preemptive of state jurisdiction. *United States v. John,* 437 U.S. 634 (1978); *Fisher v. District Court,* 424 U.S. 382 (1976); *Morton v. Mancari,* 417 U.S. 535 (1974). The essential basis of the Mississippi Supreme Court's Opinion was that minors do not acquire the legal residence and domicile of their parent(s) in the absence of the child's actual physical presence in such location and if to do so would be contrary to the parental desires. The ruling, as applied to Indians, constitutes an infringement by the State of Mississippi in the historical and federal statutory exclusive jurisdiction the Appellant tribe possesses in regulating the domestic relations of its members and residents.

THE QUESTIONS ARE SUBSTANTIAL

1. The Mississippi Supreme Court's affirmation of the lower court's denial of Appellant Tribe's Motion to Vacate and Set Aside the Decree of Adoption is repugnant to the Laws and Constitution of the United States, conflicts with prior governing decisions of this Court, and is contrary to the settled legal history and principles of Federal Indian Law. The right of Indian Tribes to regulate exclusively the domestic relations of their members upon tribal lands is established doctrine.

This court has consistently maintained that tribal forums have exclusive jurisdiction over the domestic internal relations of their members living in tribal relationship. See e.g., *Montana v United States,* 450 U.S. 544, 564 (1981); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-56 (1978); *United States v. Wheeler,* 435 U.S. 313, 322 n. 18 (1978); *Fisher v. District Court,* 424 U.S. 382, 386-389 (1976); *United States v. Quiver,* 241 U.S. 602 (1916).

Congress through the passage of the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901 et seq., statutorily provided that "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. §1911(a).

The Executive Branch of the Federal Government has also adhered to the position that tribal governments exercise exclusive jurisdiction over the Indian family when that family is resident or domiciled on

an Indian reservation. Powers of Indian Tribes, 55 I.D. 14, October 25, 1934; Opinions of the Solicitor Department of the Interior 445.

Within this context, the attempted exercise by the State of its jurisdiction over domestic relations matters of reservation resident or domiciled Indians would constitute an unlawful infringement upon the sovereignty of Appellant tribe and its tribal courts and would violate the test for state court jurisdiction over causes of action arising in Indian country with an Indian defendant established by this Court in *Williams v. Lee,* 358 U.S. 217 (1959). That test, set forth within the context of a decision that an Arizona State Court did not have jurisdiction over a suit brought by a non-Indian store owner on the Navajo Reservation against a Navajo Indian on a debt, is:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. 358 U.S. at 220.

Although this court in *Kennerly v. District Court,* 400 U.S. 423 (1971) held that 25 U.S.C. 1321 et seq. was such a governing act of Congress in that it enabled states to assume jurisdiction, since 1968 only with tribal consent, in *Washington v. Yakima Indian Nation,* 439 U.S. 463, reh. den. 440 U.S. 940 (1979) this Court made it clear that these requirements must be "strictly complied with". In any event Mississippi has never complied with this statute to acquire jurisdiction and this Court has recognized its non-P.L. 280 status. *United States v. John,* supra.

The Mississippi Supreme Court decision upholding state court jurisdiction over the adoptions of Choctaw infants of reservation parents ignores the recognized principles of federal Indian Law which serve to protect tribal self-government and established attributes of Indian sovereignty. The Mississippi Supreme Court totally disregarded the clear and emphatic rules of statutory construction for federal laws affecting tribal relations and governmental interests which were enunciated by this Court in *Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. 832 (1982):

> We have consistently admonished that federal statutes and regulations relating to Tribes and tribal activities must be "construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." *White Mountain,* supra, at 144; see also *McClanahan v. Arizona State Tax Com'n,* 411 U.S., 174-175, and n 13, (1973); *Warren Trading Post Co. v Arizona Tax Comm'n,* 380 U.S., at 690-691. This guiding principal helps relieve the tension between emphasizing the pervasiveness of federal regulation and the federal policy of encouraging Indian self-determination. Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future.

458 U.S., at 846.

Accord, *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 153 (1982); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 60 (1978).

2. The decision of the Mississippi Supreme Court misinterprets and violates the Indian jurisdiction test set out in *Williams v. Lee,* supra, because it impermissibly infringes upon the authority and right of Mississippi Choctaw Indians to make their own laws and be governed by them. Despite the rulings of this Court recognizing tribal groups as a "separate people, with the power of regulating their internal and social relations," *United States v. Kagama,* 118 U.S. 375, 381-382 (1886); see also *United States v. Wheeler,* 435 U.S. 313 (1978); and having the power to make their own substantive law in internal matters, see *Roff v Burney,* 168 U.S. 218 (1897); such as membership eligibility, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978); domestic relations, *United States v. Quiver,* 241 U.S. 602 (1916); and reservation adoptions, *Fisher v. District Court,* 424 U.S. 382 (1976), the decision of the Mississippi Supreme Court contrarily holds that it has jurisdiction over an adoption petition filed by non-Indian petitioners on Indian children of reservation parents in tacit disregard of explicit federal legislation and of its patent infringement upon this recognized area of tribal self-government.

Furthermore, the two-pronged ratio decidendi of the Mississippi Supreme Court ruling is flawed on both points of analysis; initially in its conclusion that the choice of a state forum by the reservation Indian mother would dictate the infant's legal residence and domicile and secondly that court's requirement that the children first be physically present on the reservation in order to qualify for reservation residence

and domicile. This Court previously spoke on the first of the two conclusions when, holding in *Fisher v. District Court,* supra, that tribal jurisdiction is exclusive in an Indian adoption case where all parties are reservation Indians, it said:

> Finally, we reject the argument that denying the Runsaboves access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton v. Mancari,* 471 U.S. 535 (1974).

424 U.S. 390-391.

The illogic of the Mississippi Supreme Court decision in adopting a "physical presence" requirement for residence and domicile purposes is evident in that it purports to declare the standard for *state* residency and domicile. However, this Court has repeated ruled that citizenship is not inconsistent with federal guardianship and Indian country jurisdiction. *McClanahan v. Arizona Tax Com'n,* 411 U.S. 164, 172-173 (1973); *Creek County v. Seber,* 318 U.S. 705, 718 (1943); *Tiger v. Western Investment Co.,* 221 U.S. 286, 310-313 (1911); *United States v. Celestine,* 215 U.S. 278 (1909).

To the extent the Mississippi Supreme Court opinion implies a "physical presence" requirement to these Indian infants' establishment of reservation residence and domicile, such action, again, impinges upon Appellant's tribal sovereignty in direct contravention of the Indian jurisdiction test set out in *Williams v. Lee,* supra. This Court in *American Railway Express Co. v. Levee,* 263 U.S. 19 (1923), wrote that:

> The law of the United States cannot be evaded by the forms of local practice***. The local rule applied as to the burden of proof narrowed the protection that the defendant had secured (under Federal law), and therefore contravened the law.

263 U.S. at 21.

In *Dice v. Akron, Canton & Youngstown R.R. Co.,* 342 U.S. 359 (1952), this Court also held:

> Congress * * * granted petitioner a right * * * State laws are not controlling in determining what the incidents of this Federal right should be.

342 U.S. at 361.

THE ISSUES ARE IMPORTANT

The decision of the court below in this case undermines one fundamental purpose of the Indian Child Welfare Act; protection of the reservation family unit decisional process from non-Indian interference. Grave uncertainty, too, is cast over the wisdom of continuing the Indian Health Service practice of transporting expectant mothers off-reservation to give birth. The decision portends a "jurisdictional black hole" in the

otherwise comprehensive national protection of the Indian Child Welfare Act and positions Mississippi as a potential adoption Mecca for, among others, black marketeers trading in Indian children.

Furthermore this decision involves legal principles that frequently arise in the administration of Indian Affairs nationally, such as alleged limitations on federal authority.

CONCLUSION

For these reasons the questions presented are so substantial and the decision of the court below is plainly in conflict with numerous decisions of this Court such as to require plenary consideration, with brief on the merits and oral arguments, for their resolution, or summary reversal.

Respectfully submitted:

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Counsel for Appellant

December, 1987

APPENDIX

APPENDIX

A. Statutes Involved

§ 93-17-3. Who may be adopted—who may adopt—venue of adoption proceedings—change of name.

Any person may be adopted in accordance with the provisions of this chapter in term time or in vacation, by an unmarried adult or by a married person whose spouse joins in the petition, provided that the petitioner or petitioners shall have resided in this state for ninety (90) days preceding the filing of the petition, unless the petitioner or petitioners, or one of them, be related to the child within the third degree according to the civil law, in which case such restriction shall not apply. Such adoption shall be by sworn petition filed in the chancery court of the county in which the adopting petitioner or petitioners reside or in which the child to be adopted resides or was born, or was found when it was abandoned or deserted, or in which the home is located to which the child shall have been surrendered by a person authorized to so do. The petition shall be accompanied by a doctor's certificate showing the physical and mental condition of the child to be adopted, and a sworn statement of all property, if any, owned by the child. The court shall have the power to change the name of the child as part of the adoption proceedings.

The word "child" herein shall be construed to refer to the person to be adopted, though an adult.

INDIAN CHILD WELFARE ACT, 25 U.S.C. 1901 et seq., Public Law 95-608, Nov. 8, 1978 92 Stat, 3069

§ 1901 Congressional Findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as a trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodians for temporary placement in a foster home or

institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(3) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(4) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native Village as defined in section 1602 (c) of Title 43;

(5) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(6) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit for any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(7) "Secretary" means the Secretary of the Interior; and

(8) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian

child's tribe shall have a right to intervene at any point in the proceeding.

(c) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of an Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

B. Lower Court Motion

IN THE CHANCERY COURT OF
HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE ADOPTION OF
SAMUEL SETH HOLYFIELD and MEGAN
BETH HOLYFIELD

NO. A-3574

ORREY CURTISS HOLYFIELD and
VIVIAN JOAN HOLYFIELD, PETITIONERS

MOTION TO VACATE AND SET ASIDE FINAL DECREE OF ADOPTION

NOW COMES the Mississippi Band of Choctaw Indians of the State of Mississippi, by and through Phillip Martin, Chief of the Mississippi Band of Choctaw Indians, a duly recognized Indian Tribe organized and existing by virtue of the Laws of the United States of America, Department of the Interior, Bureau of Indian Affairs, and files this their Motion to vacate, set aside and hold for naught the Final Decree of Adoption of Samuel Seth Holyfield and Megan Beth Holyfield, the minor children of Jennie Bell,

a member of the Mississippi Band of Choctaw Indians, duly enrolled on said Tribal Rolls, and residing on the Choctaw Indian Reservation in Neshoba County, Mississippi, and as grounds for said Motion would most respectfully show unto the Court the following facts, to-wit:

I.

Samuel Seth Holyfield and Megan Beth Holyfield, formerly referred to as "Little Boy Bell" and "Little Girl Bell", minors, were born unto Jennie Bell, the natural mother of said minors, a full-blooded Choctaw Indian, on the 29th day of December 1985. That the putated father of said minor Choctaw Indians is Windell Jefferson, a full-blooded, enrolled member of the Mississippi Band of Choctaw Indians.

II.

The Movant further alleges and charges that by virtue of the natural mother, Jennie Bell, and the putated father, Windell Jefferson, being members of the Mississippi Band of Choctaw Indians, the minor children, Little Boy Bell and Little Girl Bell, who are named in the Final Decree of Adoption as Samuel Seth Holyfield and Megan Holyfield, come within the provisions of *United States Code Annotated*, §§ 1902, 1903, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920 and 1921, and it is further alleged and charged that the provisions of said statutes were not complied with in the adoption proceedings held by the Chancery Court of the First Judicial District of Harrison County, Mississippi, in that the voluntary parental rights were not complied with as provided by § 1913, *U.S.C.A.*, and it is further alleged and charged that under the provisions of § 1911, *U.S.C.A.*, the Indian Tribe recognized as the Mississippi Band of Choctaw Indians have exclusive jurisdiction over child custody proceedings involving an Indian child, and that said Indian children in

this cause are wards of the Tribal Court and that the Indian Tribe retains exclusive jurisdiction and further provides that in any State court proceedings for the foster care, placement of or termination of parental rights to an Indian child, the Indian Child's Tribe shall have the right to intervene at any point; and, § 1912 *U.S.C.A.*, further provides that the Indian child's Tribe shall be notified by Registered Mail with return receipt of any pending proceedings; that in the above styled and numbered cause no notice was given as provided by said statute to the Mississippi Band of Choctaw Indians of said pending matter.

III.

It is further alleged and charged that said minor children are full-blooded Choctaw Indians and as such members of the Mississippi Band of Choctaw Indians that the best interest of said minor children would be served by said adoption proceedings being vacated and held for naught, and said minor children either being restored to the Mississippi Band of Choctaw Indians, Choctaw Social Services, or returned to the natural mother, or by the placement of said children in the Choctaw environment.

WHEREFORE, PREMISES CONSIDERED, Movant prays that this its Motion be filed and that upon a hearing, this Honorable Court will enter its Decree vacating and setting aside the Final Decree of Adoption in this cause and restoring said minor children either to the natural mother or to the Mississippi Band of Choctaw Indians, Department of Social Services for further disposition of said minor children, and Movant prays for such other relief, both general and special, as it may be entitled to receive, as in duty bound it will ever pray.

Respectfully submitted,

MISSISSIPPI BAND OF CHOCTAW INDIANS

BY: /s/
PHILLIP MARTIN, TRIBAL CHIEF

COUNSEL FOR MOVANT:

ALFORD, THOMAS AND KILGORE

BY: /s/
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Philadelphia, MS 39350
Telephone: (601) 656-1871

STATE OF MISSISSIPPI
COUNTY OF NESHOBA

THIS DAY personally appeared before me, the undersigned authority in and for the county and state aforesaid, PHILLIP MARTIN, personally known to me to be the Chief of the Mississippi Band of Choctaw Indians, an Agency of the United States Government, Department of the Interior, Bureau of Indian Affairs, who after being by me first duly sworn, deposed and stated on oath that the allegations, matters, facts and things alleged and set forth in the foregoing Motion to set Aside Final Decree of Adoption are true and correct as therein stated.

PHILLIP MARTIN

SWORN TO and subscribed before, this the 25th day of March, 1986.

/s/
Notary Public
My Commission Expires:
February 22, 1988

C. Lower Court Judgment

IN THE CHANCERY COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

In the Matter of the Adoption of
SAMUEL SETH HOLYFIELD and
MEGAN BETH HOLYFIELD NO. A-3574

JUDGMENT

THIS MATTER came on to be heard upon the Motion of the Mississippi Band of Choctaw Indians by and through their attorney, Honorable Herman Alford, and the Court having heard and considered arguments of counsel in this matter, as well as receiving and considering Memorandum Briefs, finds as follows:

I.

That the natural mother of these twin native American babies went to some efforts to see that said babies were born outside of the confines of the Choctaw Indian Reservation in Philadelphia, Mississippi. Shortly after the children's birth the parents arranged for their adoption by the Holyfields, and instituted the necessary papers and proceedings to accomplish this adoption through the Chancery Court of Harrison County, Mississippi. At no time from the birth of these children to the present date, have either of them resided on, or physically been on, the Choctaw Indian Reservation. That the Choctaw Indian Tribe has never obtained exclusive jurisdiction over the children involved herein, and the Motion to Vacate and Set Aside the Decree of Adoption should be overruled. It is, therefore,

ORDERED AND ADJUDGED, that Movants Motion to Vacate and Set Aside the Decree of Adoption herein should be overruled.

SO ORDERED AND ADJUDGED, this the 30th day of July, 1986.

/s/
Jason H. Floyd, Jr.
Chancellor

D. Lower Court Opinion

IN THE CHANCERY COURT OF
HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

ADOPTION OF
SAMUEL SETH HOLYFIELD and
MEGAN BETH HOLYFIELD NO. A-3574

OPINION

The Court having heard and considered the arguments of counsel in this matter as well as receiving and considering their briefs is of the following opinion.

It appears to the Court that the mother of these twin Native American babies went to some efforts to see that they were born outside the confines of the Choctaw Indian Reservation. Shortly after the children's birth, the parents arranged for their adoption by the Holyfields and instituted the necessary papers and proceedings to accomplish this adoption. At no time from the birth of these children to the present date have either of them resided on or physically been on the Choctaw Indian Reservation. The Court therefore finds that the Indian Tribe never obtained exclusive jurisdiction over the children involved herein and the Motion to Vacate and Set Aside the Decree of Adoption should be overruled.

Counsel for Mr. and Mrs. Holyfield is requested to prepare a judgment in accordance with this opinion, present the original to the Court and a copy to opposing counsel.

If the Court has heard no objection as to form within ten days from the receipt of the original, same will be entered as the judgment of this Court.

The original of this opinion has been filed with the Clerk pursuant to the Rules in Chancery.

July 14th 1986

/s/
Jason H. Floyd, Jr.
Chancellor

E. Opinion Below

IN THE SUPREME COURT OF MISSISSIPPI

NO. 57,659

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS
v.
ORREY CURTISS HOLYFIELD,
VIVIAN JOAN HOLYFIELD,
J.B., NATURAL MOTHER AND W.J., NATURAL FATHER

AUGUST 5, 1987

AS MODIFIED ON DENIAL OF REHEARING
September 16, 1987.

Herman Alford, Alford, Thomas & Kilgore and Edwin R. Smith, Philadelphia, for appellants.

Edward O. Miller, Gulfport, for appellees.

Before ROY NOBLE LEE, P.J., and SULLIVAN and GRIFFIN, J.J.

GRIFFIN, Justice, for the COURT:

I.

The Mississippi Band of Choctaw Indians appeals the judgment of the Harrison County Chancery Court over-

ruling its motion to vacate and set aside a decree of adoption awarding the minor children, "B.B." and "G.B.", to appellees, Orrey Curtiss Holyfield and Vivian Joan Holyfield. As error appellant assigns two propositions.

1. The trial court should not have exercised jurisdiction over adoption proceedings which, the Band contends, were subject to the exclusive jurisdiction of the Mississippi Band of Choctaw Indians Tribal Court by operation of Federal law; and

2. The trial court erred in not conforming its proceedings to the minimum federal standards under 25 U.S.C.S. §1901-1923 involving child custody proceedings for Indian children. Said standards govern Indian placements and adoptions by requiring tribal notice, due execution of parental consents, application of mandated placement priorities and adherence to tribal cultural customs.

The chancellor therein determined that the parties to the adoption had complied fully to the extent required by law, and held accordingly in awarding adoption to the Holyfields.

We affirm the lower court's opinion, and find not only that the chancellor exercised the proper jurisdiction over this action, but also that the lower court kept within the federal guidelines established under the Indian Child Welfare Act.

II.

Twin babies were born to J.B. on December 29, 1985, in Gulfport, Harrison County, Mississippi. The children were born out of wedlock to J.B. and W.J., the putative father, who are both full-blood Choctaw Indians. A petition for adoption was filed on January 16, 1986, by the Holyfields, who were joined in such by the natural mother. A consent to adoption form was executed by J.B. on January 10, 1986. A consent to adoption form and reaffirmation

thereof were filed by W.J. on January 11, 1986, and June 13, 1986, respectively.

The Chancellor issued the decree of adoption on January 28, 1986.

The Mississippi Band of Choctaw Indians ("The Band") filed a motion to vacate and set aside the final decree of adoption on March 31, 1986.

Affidavits again reaffirming their consent to adoption forms were filed by the natural parents on May 31, 1986, and June 9, 1986. The content of these forms stated specifically that (1) the natural parents reaffirmed their consent to adoption; (2) the adoptive parents to be the Holyfields; (3) the children were born in Gulfport, Mississippi, and have at no time been on the Choctaw Indian Reservation in Neshoba County, Mississippi; and (4) it is the natural parents' desire that the children remain in Gulfport and with the Holyfields.

On July 14, 1986, the lower court overruled the Band's motion and entered its decree on July 30, 1986.

III.

[1] The major concern of this Court in reviewing cases such as the one at bar is a determination of whether the chancellor acted in the best interest of the minor children in his denial of the Band's petition on the one hand, and his awarding adoption to appellees, the Holyfields, on the other. See *Eggleston v. Landrum*, 210 Miss. 645, 50 So.2d 364 (1951) ("The welfare of the child is the primary consideration in providing for his adoption"). However, where a jurisdictional problem exists, we cannot ignore it in favor of finding for the welfare of the child, and must act in accordance with the law rather than following what we deem to be purely an equitable solution.

There is no doubt that the area designated for Choctaw Indians residing in Neshoba County, Mississippi, lies within

the jurisdiction of the U.S. Government, at least as far as certain federal statutes operate to preclude the exercise of State criminal jurisdiction therein. See, e.g., *U.S. v. John*, 560 F.2d 1202 (5th Cir. 1977), Rev'd 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978); on Remand, 587 F.2d 683 (5th Cir. 1979).

The definition of "Indian Country" is provided in Title 18, §1151 of the U.S. Code. Within this definition are three categories of land: the one with which we are concerned reads in pertinent part, "All land within the limits of any Indian reservation under the jurisdiction of the U.S. Government, notwithstanding the issuance of any patent." The area in Neshoba County was declared by Congress in 1939 to be held in trust by the federal government for the benefit of the Mississippi Choctaw Indians. *U.S. v. John, supra*, at 649, 98 S.Ct. at 2549. The declaration was followed in 1944 by Congressional approval of a constitution and by-laws as adopted by the Band, which also issued a proclamation establishing the reservation at that time. *Id.*

The Constitution and the by-laws under the Choctaw Indian Tribal Code set forth the jurisdiction of the tribe in Mississippi. The Supreme Court, in *U.S. v. John, supra* at footnote 21, did not consider the question of whether federal law dealing with the Indian pre-empts tribal jurisdiction. However, in the case sub judice the tribal code mirrors the language of the federal government to the extent that no conflict in laws in apparent.

The applicable sections in the federal code dealing with child custody proceedings are 25 U.S.C.S. §1911(a) and §1918, which read in part:

> **§1911. Indian tribe jurisdiction over Indian child custody proceedings.**
>
> **(a) Exclusive jurisdiction.** An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian

> child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
>
> **§1918. Reassumption of jurisdiction over child custody proceedings**
>
> **(a) Petition; suitable plan; approval by Secretary.** Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

The tribal code section addressing jurisdiction in adoption proceedings is §11-17-5 of the revised constitution and by-laws of the Mississippi Band of Choctaw Indians (1975), article III, which states:

> **§11-7-5 JURISDICTION OVER ADOPTION**
>
> **THE MISSISSIPPI BAND OF CHOCTAW INDIANS,** shall have full original jurisdiction in adoption matters where the persons to be adopted is an enrolled member of the **TRIBE** or eligible for enrollment, and also where the child lives within the **RESERVATION** or where the case has been transferred back to the **CHOCTAW TRIBAL COURT** from the State Court.

We surveyed the decisions of various courts faced with a dilemma similar to the one at bar, and found almost uniformly that, in accordance with 25 U.S.C.S. §1911(d) of the Indian Child Welfare Act, full faith and credit has been given by the states to the acts of any Indian tribe attributable to child custody proceedings. See *Native Village of Stevens v. Smith,* 770 F.2d 1486 (9th Cir. 1985) (the Federal court therein determined that a tribal counsel decision to remove a child from his home and place him under tribal custody, because it was in the best interest of the child, must be given full faith and credit by the State under 25 U.S.C.S. §1911(d).) But see, *Re: J.R.S.,* 690 P.2d 10 (Alaska 1984) ("Distinction is made between adoptive placement and termination of parental rights, and only in the latter does §1911 support intervention"); *State ex rel. Department of Human Services v. Jojola,* 99 N.M. 500, 660 P.2d 590 (1983) ("25 U.S.C.S. §1911(a) is inapplicable to paternity determination and child support enforcement when state is a party and the other party is an Indian.")

[2,3] The key language on which the case at bar turns is the requirements that the Indian child reside or be domiciled within the reservation of the tribe. Hence, even if this Court were to concede that the lower court erred in exercising jurisdiction over the adoption proceedings, which it does not, in any event the judge did conform and strictly adhere to the minimum federal standards governing adoption of Indian children with respect to parental consent, notice, service of process, etc.

At no point in time can it be said the twins resided on or were domiciled within the territory set aside for the reservation. Appellant's argument that living within the womb of their mother qualifies the children's residency on the reservation may be lauded for its creativity; however, apparently it is unsupported by any law within this state, and will not be addressed at this time due to the far-

reaching legal ramifications that would occur were we to follow such a complicated tangential course.

Appellant cites two cases which recognize "the doctrine" that the domicile of minor children follows that of the parents. See *Boyle v. Griffin,* 84 Miss. 41, 36 So. 141 (1904); and *Stubbs v. Stubbs,* 211 So.2d 821 (Miss. 1968). However, in *Stubbs* this Court actually held that domicile was determined by physical presence, declaration of intent, and the relevant facts and circumstances, and in *Boyle, supra* at 84 Miss. at 42, 36 So. 141, the thrust of that case was towards a determination of the inability of the children thereir to change their domicile from that of the parents during their minority, and, if the parents changed their domicile, that of the children follows it.

The facts and laws as applied in *Stubbs* and *Boyle* are clearly distinguishable from the case at bar: the Indian twins have never resided outside of Harrison County, Mississippi, and were voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents, and it is undisputed that the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi. The problem of guardianship for minor children in *Boyle* is nowhere present in this action, nor is the question of change of domicile at issue.

The domicile of B.B. and G.B. has been and continues to be Harrison County, and the court therein exercised proper jurisdiction over the children's adoption proceedings. And, although these proceedings in the lower court actually escape applicable federal law on Indian Child Welfare for this reason, the chancellor insured that that the minimum federal standards would be met in any event when the court chose to exercise jurisdiction. Hence we note that submission of various forms filed by the natural

parents affirming and reaffirming their consent to adoption.

There being no merit to either error assigned by the Mississippi Band of Choctaw Indians, the order of the lower court is affirmed.

AFFIRMED.

WALKER, C.J., ROY NOBLE LEE and HAWKINS, P.JJ., AND DAN M. LEE, PRATHER, ROBERTSON, SULLIVAN and ANDERSON, J.J., concur.

E. Notice of Appeal

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. ____

IN THE MATTER OF B.B. AND G.B., MINORS.

MISSISSIPPI BAND OF CHOCTAW INDIANS
Appellant,

v.

ORREY CURTISS HOLYFIELD,
VIVIAN JOAN HOLYFIELD,
J.B., NATURAL MOTHER AND W.J., NATURAL FATHER
Appellees.

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NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Mississippi Band of Choctaw Indians, the appellant above-named, hereby appeals to

the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Mississippi, affirming the denial of Appellant's motion to vacate and set aside the decreee of adoption, entered in this action on September 16, 1987.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Counsel for Appellant
EDWIN R. SMITH
P.O. Box 839
Philadelphia, Mississippi 39350
Telephone (601) 656-5251

No. 87-980

In the Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS,
Appellant,

vs.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS APPEAL AND TO DENY PETITION FOR WRIT OF CERTIORARI

RICHARD J. SMITH
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Counsel for Appellees

April, 1988

R. L. MERRIHEW, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3060

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No. 87-980

In the Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.
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Appellant,

VS.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS APPEAL AND TO DENY PETITION FOR WRIT OF CERTIORARI

Appellees move this Honorable Court under Supreme Court Rule 16 to dismiss the appeal or, in the alternative, to deny the Petition for Writ of Certiorari because the Appellant, Mississippi Band of Choctaw Indians, lacks standing as required under Article III, Section 2, of the Constitution of the United States of America.

Respectfully moved, on this the 20th day of April, 1988.

FACTS

The Appellees believe that the facts as presented in the Opinion of the Mississippi Supreme Court as reflected in the Appendix of the Appellant's Jurisdictional Statement at pages 11a-13a adequately state the posture of the Appeal.

J.B. and W.J., the natural mother and father of the minors in question, are full blood Mississippi Choctaw Indians and are members of the Mississippi Band of Choctaw Indians. When J.B. became pregnant she made a conscience decision to give birth to her children off of the reservation and to have them adopted by parents not living on the reservation. Both J.B. and W.J. consented to and joined in the adoption proceeding and all state requirements as to jurisdiction and procedure and substance were complied with resulting in the Holyfields, also Appellees herein, becoming the adoptive parents of the twins to which J.B. gave birth. The twins have resided with the Holyfields since a few days following their birth on December 29, 1985.

ARGUMENT

I.

The Mississippi Band of Choctaw Indians Lacks Standing to Contest the Adoption of the Choctaw Infants.

This appeal is presented by an Appellant, the Mississippi Band of Choctaw Indians, which lacks standing as it is not a real party in interest to the adoption.

It is undisputed in the record that the natural mother and natural father of the Native American babies placed for adoption consented to the proceeding and possessed the capacity to so consent; further, there were no objections to the adoption from any family representatives on either side. Quite simply, what is presented to this Court is an organization, and nothing more, disagreeing and protesting whether the natural parents of two illegitimate children may put them up for adoption when the natural parents have determined that it is in the best interest and welfare of the children. It is irrelevant that the adopted children are Choctaw Indians of full blood, making them merely eligible for enrollment in the Mississippi Band of Choctaw Indians.

Article III, Section 2, of the Constitution of the United States of America, as interpreted by this Court, requires, for purposes of standing, some actual or threatened injury amenable to judicial remedy. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 70 L.Ed.2d 700, 102 Sup.Ct. ..... (1982).

> [Article 3] tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a

concrete factual context conducive to a realistic appreciation of the consequence of judicial action.

Id. at ....., 70 L.Ed.2d at 709, 102 Sup.Ct. at .....

In *Valley Forge* a taxpayers' organization dedicated to the separation of church and state challenged certain property transfers made to private schools. This Court held that the organization lacks standing by applying the rules set out in *Sierra Club v. Morton,* 405 U.S. 727, 740, 31 L.Ed.2d 636, ..., 92 Sup.Ct. 1361, ... (1972):

> The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.

Cited in *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 70 L.Ed.2d 700, 102 Sup.Ct. ..... (1982). The only ones with a direct interest in the outcome of this action are the Appellees, including the minor children and the adoptive parents who have been together for more than two years. Reviewing the Appellant's position and argument to this Court as well as to the Mississippi Supreme Court it becomes clear that the Appellant is actually contesting the opinion or attitude of the Indian-Appellees toward life on the reservation and the life these two competent adults chose for their infant children. The Appellant's argument also seems to be that it, the Mississippi Band of Choctaw Indians, possesses some proprietary or possessory interest to the minor Choctaw Indians who were not even born on the reservation and who are not members of the Mississippi Band of Choctaw Indians.

If the Appellant possesses standing to contest the adoption of these Choctaw Indians, when the adoption was consented to by their parents, then it would follow that any state having reason to believe that the criteria for an adoption or divorce or any other domestic matter had not been met would possess standing as well to contest the rights of the parties consenting to the action. For any State, or for that matter, the Mississippi Band of Choctaw Indians, to have such authority would render the concept of "standing" meaningless.

Every case cited by the Appellant in support of its jurisdictional statement either involves individual Indians as litigants or involves a tribe acting on behalf of a member with a direct interest or, involves causes of action or facts which actually arose on a reservation. (If the Appellant's argument succeeded that because the Indian mother conceived and carried the fetus on the reservation, then it would have to follow that if an Indian conceived or designed the plans for a criminal act while on the reservation but committed the crime off of the reservation, then the tribal court would still possess jurisdiction.) The Mississippi Supreme Court in its opinion pointed out that while the Mississippi Band of Choctaw Indians' by-laws grant "full original jurisdiction in adoption matters," By-laws of the Mississippi Band of Choctaw Indians, § 11-17-5 (1975), such is not exclusive jurisdiction. It is up to an individual Choctaw Indian to decide if he or she chooses to bring a controversy to the tribal court or to a state court, so long as that state's court possesses jurisdiction as well.

It is the position of the Appellees that the Mississippi Band of Choctaw Indians lacks standing according to Article III, Section 2 of the United States Constitution and

according to this Court's opinion *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 70 L.Ed.2d 700, 102 Sup.Ct. ..... (1982). Since the Mississippi Band of Choctaw Indians cannot overcome this threshold question which precludes Federal Jurisdiction, the appeal should be dismissed.

II.

The Appellant-Petitioner Has Failed to Show Any Reason for This Court to Grant a Writ of Certiorari As There Are No Conflicts Within the Circuits, There Is Not a Matter Before the Court Which Has Not Been or Should Be Decided, and the Decision of the Mississippi Courts Is Not in Conflict With Prior Decisions of This Court.

This Court has consistently ruled regarding certain fundamental rights to which all American citizens are entitled. The fundamental right to be a parent (or not to be a parent), the right to control the health, education and welfare of one's child, the right to procreate, and even the right to travel to and fro, are resolved in favor of the Appellees without conflict and without further need for explanation. *Skinner v. Oklahoma,* 316 U.S. 535, ... L.Ed.2d ....., ... Sup.Ct. ..... (1942) (Right to marriage and procreate, fundamental); *Moore v. City of East Cleveland,* 431 U.S. 494, 52 L.Ed.2d 531, 97 Sup.Ct. 1932 (1977) (Right to define one's own family and living arrangement without intrusion from government, fundamental); *Carey v. Population Services International,* 431 U.S. 678, 52 L.Ed. 2d 675, 97 Sup.Ct. 2010 (1977) (Right to privacy, fundamental); *Shapiro v. Thompson,* 394 U.S. 618, 22 L.Ed.2d 600, 89 Sup.Ct. 1322 (1969) (Right to travel interstate, fundamental).

The Mississippi Supreme Court has ruled that the residency of a minor is dependent upon the intent of the parent. *Mississippi Band of Choctaw Indians v. Holyfield, et al.,* 511 So.2d 918 (Miss. 1987); *Citing Boyle v. Griffin,* 84 Miss. 41, 36 So. 141 (1904), *Stubbs v. Stubbs,* 211 So.2d 821 (Miss. 1968). It is the right of the state to define the perimeters from which it will grant jurisdiction before its courts. Ninth Amendment, United States Constitution. The Appellant not only lacks standing but also lacks the substantive authority from this Court to challenge the decision of the Mississippi Supreme Court.

CONCLUSION

Despite the Appellant's argument, the Indian Child Welfare Act of 1978, Title 25, U.S.C. §§ 1901, et seq. should not be interpreted to prohibit Choctaw Indians who happen to be members of the Appellant's organization, from exercising fundamental rights granted to them by the Constitution. The Indian-Appellees, and the adopted children subject of this proceeding, are not the property of the Mississippi Band of Choctaw Indians. The Appellees did nothing improper or illegal. They elected a forum within which to bring their case and fulfilled the procedural and substantive requirements of that forum.

For the aforestated reasons, your Appellees submit that the appeal from the judgment of the Supreme Court of the State of Mississippi should be dismissed.

Respectfully submitted,

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No. 87-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.
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On Appeal From the Supreme Court of Mississippi

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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Appellees.

On Appeal from the Supreme Court of Mississippi

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

ARGUMENT

I.

The Mississippi Band of Choctaw Indians Has Standing to Contest the Adoption of the Choctaw Infants.

In this appeal seeking to have an off-reservation state court adoption of twin Choctaw Indian infants of reservation parents declared void for lack of jurisdiction, the Appellees have moved to dismiss con-

tending initially that Appellant Indian tribe, the Mississippi Band of Choctaw Indians, lacks Article III standing to contest this adoption of its tribal children. Yet Appellees' brash assertion that "Quite simply, what is presented to this Court is an organization, and nothing more, disagreeing and protesting whether the natural parents of two illegitimate children may put them up for adoption when the natural parents have determined that it is in the best interest and welfare of the children" [Appellees Br. 3] disregards the controlling, preemptive federal law—Indian Child Welfare Act of 1978, 25 U.S.C. §§1901 *et seq.*—granting Indian tribes special standing in adoption and placement proceedings over their tribal children and vesting exclusive tribal court jurisdication over adoptions of reservation resident and domiciled tribal children; substitutes for Appellant's substantive federal claims of no state court jurisdiction and of infringement upon upon tribal sovereignty the Appellant's characterization of the tribe's objections as mere disagreement with the natural parents' determination of the children's best interest and welfare; and misplaces reliance for Appellees' newly contrived position upon the claimed authority of *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

Congress' expressed finding in 25 U.S.C. §1901(3) "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" together with the Congressional Declaration of Policy "to protect the best interest of Indian Children and promote the stability and security of Indian tribes and families" (25 U.S.C. §1902) by *inter alia* vesting tribal court "jurisdiction exclusive

as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe" [25 U.S.C. §1911(a)] and providing that "the Indian child's tribe shall have a right to intervene at any point in . . . any State court proceeding for the . . . determination of parental rights to, an Indian child" [25 U.S.C. §1911(c)] collectively and cumulatively dispatch all points of argument Appellees raised initially in their Motion to Dismiss.

Appellees reliance on *Valley Forge Christian College v. Americans United for Separation of Church and State, supra,* is misplaced in that it equates the Appellant Indian tribe with a taxpayers organization not enjoying the expressed federal statutory standing cited in the paragraph above. Although federal statutes creating new interests cannot go beyond Article III's requirement of "injury in fact" [*Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)], the legislative history to the Indian Child Welfare Act confirmed and embraced the case holding of *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975) which states:

> ". . . there can be no greater threat to essential tribal relations; and no greater infringement on the rights of the Crow Tribe to govern themselves than to interfere with tribal control over the custody of their children. . . ." 347 A.2d 228, at 237-238.

Clearly Article III standing requirements relating to "injury in fact" are met by the terms of the statute and by the facts of the situation.

Throughout Argument I of Appellees' brief on its Motion to Dismiss Appellant's position is miscast as a disagreement over opinion or attitude toward reservation life and, without citing authority, Appellees assert that "it is up to the individual Choctaw Indian to decide if he or she chooses to bring a controversy to the tribal court or to a state court, so long as that state's court possesses jurisdiction as well". [Appellees Br. 5] While maintaining a standing objection to Appellees' recharacterization of Appellant's arguments and position, Appellant also disagrees that any choice of forums does or could exist in this case. In *Fisher v. District Court*, 424 U.S. 382 (1976), this Court in holding the tribal jurisdiction is exclusive in Indian adoption cases where all parties are reservation Indians said:

> Finally, we reject the argument that denying the Runsaboves access to the Montant courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdiction holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton v. Mancari*, 471 U.S. 535 (1974).

424 U.S. 390-391.

None of Appellees' objections pertaining to standing are supportable and Appellant's arguments and

authorities cited above clearly refute the contentions of Argument I of the Motion to Dismiss. The Motion should be denied and plenary judgment for Appellant should be granted or brief on the merits and oral arguments should be ordered.

II.

The Decision of the Mississippi Courts Is in Conflict with Prior Decisions of This Court, Is a Matter Before This Court Which Should be Decided, And Is in Conflict With Other Circuits.

Appellees' broad libertarian claim to seemingly unfettered fundamental rights "to be a parent (or not be a parent), . . . to control the health, education, and welfare of one's child, . . . to procreate, and even . . . to travel to and fro" [Appellees Br. 6] are not the subject of challenge by Appellant tribe but Appellees' assertion (curiously under the claimed authority of the Ninth Amendment, United States Constitution[1]) that "It is the right of the State to define the perimeters [*sic*] from which it will grant jurisdiction before its courts" [Appellees Br. 7] raises anew the very question decided ten years ago in the tribe's favor in *United States v. John*, 437 U.S. 634 (1978). Though admittedly not decided on the basis of a Ninth Amendment claim, the unanimous ruling of this Court was that Mississippi's courts could not exercise their jurisdiction over Indians within the state in circumstances where federal plenary law over Indian affairs

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[1] Amendment IX, U.S. Constitution provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

divested the state of jurisdiction and instead conferred it exclusively in federal and/or tribal court. The Mississippi Supreme Court's ruling, therefore, that the residency of a minor is dependent upon the intent of the parent, if indeed a fair characterization of the opinion, could possibly be a legitimate basis for granting jurisdiction before its courts but only if the state has not been divested of its jurisdiction by some plenary exercise of power by Congress. 25 U.S.C. §1911(a) clearly divests the state of any adoption jurisdiction it may ever have had over children of reservation resident and domiciled parents and *Fisher v. District Court, supra,* tends to indicate that no state jurisdiction existed even before this 1978 statutory divestment.

The sole decision Appellant has found from another circuit substantially in agreement with the Mississippi Supreme Court was a 1983 unreported denial of a Writ of Prohibition in a state adoption of a Laguna Pueblo infant born off-reservation to a reservation mother and father out-of-wedlock. Both the Pueblo and the father took an appeal to this Court which granted leave for the filing of an amicus brief and postponed consideration of the jurisdiction question to the hearing of the case on the merits, *Pino v. District Court of the Second Judicial District's Children's Court,* 471 U.S. 1014 (1985) invited the Solicitor General to file a brief expressing the views of the United States, Id. ___ U.S. ___ , and dismissed the case under Rule 53 after the Court of Appeals of New Mexico in a reexamination of the case voided the adoption for lack of jurisdiction. *Matter of Adoption of Baby Child,* 700 P.2d 198 (N.M.App. 1985). It therefore appears that the single jurisdiction to have ruled in

conformity with the Mississippi Court reversed its position once it became evident this Court would probably be granting review on the case.

CONCLUSION

For the aforestated reasons Appellant Mississippi Band of Choctaw Indians submits that the Appellees' Motion to Dismiss should be denied.

Respectfully Submitted

EDWIN R. SMITH
Box 839
Philadelphia, Mississippi 39350
(601) 656-5251

Counsel for Appellant

May 3, 1988

No. 87-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS

Appellant,

VS.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,

Appellees.

On Appeal From the Supreme Court of Mississippi

JOINT APPENDIX

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1922 23rd Avenue
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**Counsel of Record*

JURISDICTIONAL STATEMENT FILED DECEMBER 15, 1987
REVIEW GRANTED MAY 23, 1988

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The following motions, opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 16, 1986—Appellees Original Petition for Adoption, Doctor's Certificates, Consents to Adoption and Judge's Certifications Filed in the Chancery Court, First Judicial District, Harrison County, Mississippi.

January 28, 1986—Final Decree Entered by the Chancery Court, First Judicial District, Harrison County, Mississippi.

March 31, 1986—Motion to Vacate and Set Aside Final Decree of Adoption Filed in the Chancery Court, First Judicial District, Harrison County, Mississippi.

June 3, 1986—Judge's Certifications Filed in the Chancery Court, First Judicial District, Harrison County, Mississippi.

June 9, 1986—Affidavits and Reaffirmations of Consents to Adoption Filed in the Chancery Court, First Judicial District, Harrison County, Mississippi.

July 14, 1986—Opinion Filed in the Chancery Court, First Judicial District, Harrison County, Mississippi.

July 14, 1986—Order Filed in the Chancery Court, First Judicial District, Harrison County, Mississippi.

August 11, 1986—Notice of Appeal Filed in the Chancery Court, First Judicial District, Harrison County, Mississippi.

October 30, 1986—Assignments of Error Filed in the Supreme Court of Mississippi.

October 30, 1986—Brief of Appellant Filed in the Supreme Court of Mississippi.

January 5, 1987—Brief of Appellee Filed in the Supreme Court of Mississippi.

IN THE CHANCERY COURT OF HARRISON COUNTY

FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE ADOPTION OF CAUSE NO A-3577

LITTLE BOY BELL and LITTLE GIRL BELL, Minors

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, and JENNIE BELL, Natural Mother PETITIONERS

WINDELL JEFFERSON, Natural Father DEFENDANT

PETITION FOR ADOPTION
FILED JANUARY 16, 1986

Comes now, ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD and files this their Petition for Adoption of said minor children, LITTLE BOY BELL and LITTLE GIRL BELL, and would respectfully show unto the Court the following facts, to-wit:

I.

That the Petitioners, ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, are adult resident citizens of the First Judicial District of Harrison County, Mississippi, and have resided in the State of Mississippi for more than six (6) months next preceding the filing of this Petition. That Petitioner, JENNIE BELL is an adult resident citizen of Philadelphia, Mississippi, residing on the Choctaw Indian Reservation in Philadelphia, Mississippi. Petitioners would show that said minors sought to be adopted are physically and mentally fit to be adopted and that certificates of physicals will be attached hereto and made a part hereof as though manually copied in exact words and figures and marked as Exhibit "A," and that

said minor children do not have any property of any kind whatsoever, and do not have a guardian or ward.

II.

That said minors, LITTLE BOY BELL and LITTLE GIRL BELL, were born December 29, 1985, in Gulfport, Mississippi, and have resided herein since that time and are presently residing here.

III.

That the Petitioner, JENNIE BELL, is the mother of said minors in this Petition and has executed her consent to this proceeding. That the Defendant, WINDELL JEFFERSON, is a non-resident citizen of Harrison County Mississippi and is the father of said minors, LITTLE BOY BELL and LITTLE GIRL BELL, and has executed his consent to this proceeding.

IV.

That the Court has jurisdiction over the parties and subject matter herein.

V.

That the Defendant, WINDELL JEFFERSON, and father has not ever contributed to the support or welfare of said minor children and never intends to do so. That the Defendant has never been married to the mother of said children.

VI.

That Petitioners, ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD would show that they have complete and entire custody of said minor children, and are desirous of adopting said minor children as their own and heirs-at-law, and further that Petitioner, ORREY

CURTISS HOLYFIELD, is of one-eighth (1/8) blood Choctaw Indian. ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, humbly believe that they are fit, suitable and proper persons to adopt said children and to continue to have the responsibility of their care, custody and control as though born to them. That your Petitioners, ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, would further show that if permitted to adopt said children, they will rear and care for said children as a member of their family, as they already have, and will continue to do for them in all respects as if born to them, including the right of inheritance from them to confer on said children all rights of inheritance provided by law and all rights conferred on the Petitioners by virtue of the Mississippi Code of 1972, Annotated.

VII.

That Petitioner, JENNIE BELL, is the mother of said children and has given her consent to this proceeding as indicated by attached Exhibit "B." That said consent was executed in the presence of a Judge of competent jurisdiction and more than ten days after the birth of said minors subject of this proceeding. That Defendant, WINDELL JEFFERSON, father of said children, has executed his consent which is attached hereto as Exhibit "C."

VIII.

Your Petitioners, ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, would show that they would name said minor children, SAMUEL SETH HOLYFIELD and MEGAN BETH HOLYFIELD.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that this their Petition be received and filed, and that upon a hearing hereon, the Court will enter a Decree, declaring that from henceforth said minor children born on the 29th day of December, 1985, in the City of Gulfport,

State of Mississippi, be for all legal intents and purposes the children of the Petitioners, ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, with all rights and benefits arising from a natural parent-child relationship, particularly the right of inheritance from and through the adopting parents, ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, by the laws of the State of Mississippi, and that the adopting parent shall inherit from and through said children just as though said children had been born to the Petitioners including all rights existing by virtue of the Mississippi Code, 1972, Annotated, and that the natural parents JENNIE BELL and WINDELL JEFFERSON, shall not inherit from and through said children. That the minor childrens' names shall be SAMUEL SETH HOLYFIELD and MEGAN BETH HOLYFIELD, by which name they shall hereinafter be known as and called, and that this Court will enter such other and further order as it may deem proper in the premises.

RESPECTFULLY SUBMITTED,

/s/
ORREY CURTISS HOLYFIELD

/s/
VIVIAN JOAN HOLYFIELD

/s/
JENNIE BELL

STATE OF MISSISSIPPI
COUNTY OF HARRISON

PERSONALLY appeared before me, the undersigned authority, in and for the aforesaid County and State, the within named, ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD and JENNIE BELL, who being duly sworn by me an [sic.] oath, states that the matters, things, and

facts set forth in the above and foregoing Petition are true and correct as therein stated.

/s/
ORREY CURTISS HOLYFIELD

/s/
VIVIAN JOAN HOLYFIELD

/s/
JENNIE BELL

STATE OF MISSISSIPPI
COUNTY OF HARRISON

SWORN to and subscribed before me, this the *10th* day of January, 1986.

/s/ Edward O. Miller
NOTARY PUBLIC

MY COMMISSION EXPIRES:
3/23/87

DOCTOR'S CERTIFICATE
FILED JANUARY 16, 1986

The undersigned, a medical doctor licensed to practice medicine in Harrison County, Mississippi, does hereby certify that Bell Baby Boy has developed normally, both mentally and physically, to the best of his knowledge and belief.

This the 14th day of January, 1986,

/s/ David Reever, M.D.
Doctor's Signature

EXHIBIT "A"

DOCTOR'S CERTIFICATE
FILED JANUARY 16, 1986

The undersigned, a medical doctor licensed to practice medicine in Harrison County, Mississippi, does hereby certify that Bell Baby Girl has developed normally, both mentally and physically, to the best of his knowledge and belief.

This the 14th day of January, 1986.

/s/ David Reever, M.D.
Doctor's Signature

EXHIBIT "A"

STATE OF MISSISSIPPI
COUNTY OF HARRISON

CONSENT TO ADOPTION
FILED JANUARY 16, 1986

I, the undersigned, JENNIE BELL, an adult resident non-citizen of the City of Philadelphia, State of Mississippi, the natural mother of LITTLE BOY BELL and LITTLE GIRL BELL, born December 29, 1985, both minors, do hereby grant unto ORREY CURTISS HOLYFIELD, and VIVIAN JOAN HOLYFIELD, the absolute right to the care, custody, control, service and earnings of said minors.

It is further understood that I hereby disclaim any further responsibility for the care and support of said minors and that said minors cannot be reclaimed by me.

After due consideration and believing that the best interest of said minors will be promoted by their being placed with the said ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, I do fully, finally, completely and absolutely consent to the adoption of said minors by said party, without further notice with the same force and effect as though I personally were present and gave such consent at the time of the adoption, expressly waiving the right to notice of any adoption hearing.

I further give and grant unto the said ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, the right of guardianship of said minors with the same parental control and authority that I would have, had I retained custody of said minors.

WITNESS MY SIGNATURE, this the 10th day of January, 1986.

/s/
JENNIE BELL

STATE OF MISSISSIPPI
COUNTY OF HARRISON

Sworn to and subscribed before me, this the 10th day of January, 1986.

/s/ Edward O. Miller
NOTARY PUBLIC

My Commission Expires:
3/23/87

EXHIBIT "B"

STATE OF MISSISSIPPI
COUNTY OF HARRISON

JUDGE'S CERTIFICATE
FILED JANUARY 16, 1986

I, Jason H. Floyd, Jr. the undersigned Chancellor for the Eighth Judicial District, State of Mississippi, do hereby certify that JENNIE BELL has appeared before me for the purpose of executing a Parent's Consent for the surrender of her children and for adoption, and further, that all terms and provisions, along with the consequences of the Consent Form were fully explained in detail to the said JENNIE BELL in English.

I certify that that the said JENNIE BELL stated that she fully understood the nature of these proceedings, and that same was fully understood by said JENNIE BELL, and that the Consent and Waiver was given in full compliance with Section 103(a) of Public Law 95-608.

This the 10th day of January, 1986.

/s/ Jason H. Floyd, Jr.
CHANCELLOR

STATE OF MISSISSIPPI
COUNTY OF NESHOBA

CONSENT TO ADOPTION
FILED JANUARY 16, 1986

I, the undersigned, WINDELL JEFFERSON, an adult resident non-citizen of the City of Philadelphia, State of Mississippi, the natural father of LITTLE BOY BELL and LITTLE GIRL BELL, born December 29, 1985, both minors, do hereby grant unto ORREY CURTISS HOLYFIELD, and VIVIAN JOAN HOLYFIELD, the absolute right to the care, custody, control, service and earnings of said minors.

It is further understood that I hereby disclaim any further responsibility for the care and support of said minors and that said minors cannot be reclaimed by me.

After due consideration and believing that the best interest of said minors will be promoted by their being placed with the said ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, I do fully, finally, completely and absolutely consent to the adoption of said minors by said party, without further notice with the same force and effect as though I personally were present and gave such consent at the time of the adoption, expressly waiving the right to notice of any adoption hearing.

I further give and grant unto the said ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, the right of guardianship of said minors with the same parental control and authority that I would have, had I retained custody of said minors.

WITNESS MY SIGNATURE, this the 11th day of January, 1986.

/s/
WINDELL JEFFERSON

STATE OF MISSISSIPPI
COUNTY OF NESHOBA

SWORN to and subscribed before me, this the 11th day of January, 1986.

/s/ Arthur C. Sharp, Jr.
NOTARY PUBLIC

My Commission Expires:
8-8-89

EXHIBIT "C"

STATE OF MISSISSIPPI
COUNTY OF HARRISON

JUDGE'S CERTIFICATE
FILED JUNE 3, 1986

I, JASON H. FLOYD, JR. the undersigned Chancellor for Harrison County, the First Judicial District, State of Mississippi, do hereby certify that WINDELL JEFFERSON has appeared before me for the purpose of executing a Parent's Consent for the surrender of his children and for adoption, and further, that all terms and provisions, along with the consequences of the Consent Form were fully explained in detail to the said WINDELL JEFFERSON in English.

I further certify that that the said WINDEL JEFFERSON stated that he fully understood the nature of these proceedings, and that same was fully understood by said WINDELL JEFFERSON, and that the Consent and Waiver were given full compliance with Section 103(a) of Public Law 95-608.

This the 3rd day of June, 1986.

/s/ Jason H. Floyd, Jr.
CHANCELLOR

THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

In the Matter of the Adoption of SAMUEL SETH HOLYFIELD and MEGAN BETH HOLYFIELD — No. A-3574

ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD — PETITIONERS

FINAL DECREE OF ADOPTION
FILED JANUARY 28, 1986

This day this cause came on to be heard upon the Petition of ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, and it appearing to the Court that it has full and complete jurisdiction of all of the parties and of the subject matter, and the Court, after hearing and considering the Petition and the testimony presented in open Court, finds that Petitioners, ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, are adult resident citizens of the First Judicial District of Harrison County, Mississippi, and had resided in the State of Mississippi for more than six (6) months prior to the filing of this Petition. That SAMUEL SETH HOLYFIELD and MEGAN BETH HOLYFIED, Minors, are residing with Petitioners, ORREY CURTISS HOLYFIELD and VIVAN JOAN HOLYFIELD, that the children sought to be adopted are physically and mentally fit to be adopted. That said children do not have any property of any kind whatsoever, and do not have a guardian.

I.

The Court further finds that the children sought to be adopted were born December 29, 1985, in Gulfport, Mississippi.

II.

The Court further finds that the natural mother, Petitioner, and the natural father, Defendant, have executed Consents to Adoption which are on file in said cause.

The Court further finds that ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, are fit and proper persons to adopt said children, and would show that they have complete and entire custody of said minors, and that it would be in the best interest of said minors that they be adopted by Petitioners, ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD. That the minors have no property of their own. It is therefore,

ORDERED AND ADJUDGED, that SAMUEL SETH HOLYFIELD and MEGAN BETH HOLYFIELD, were born on December 29, 1985, in the City of Gulfport, State of Mississippi, be and are for all legal intents and purposes, the children of ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, the same as though they were born in lawful wedlock, with all the mutual rights, privileges and benefits, duties and responsibilities, including rights existing by virtue of the Mississippi Code of 1972, Annotated, with full rights of inheritance from and through them, as a son, daughter, and heirs-at-law, and that their names be and are hereby SAMUEL SETH HOLYFIELD, and MEGAN BETH HOLYFIELD, by which name they shall hereafter be known and called. It is further,

ORDERED AND ADJUDGED that the natural parents shall not inherit from and through said children. It is further,

ORDERED AND ADJUDGED, that the Court waives the six (6) month waiting period, and does here and now approve these adoptions.

SO ORDERED AND ADJUDGED, this the 28th day of January, 1986.

/s/ Jason H. Floyd, Jr.
Chancellor

EDWARD O. MILLER
Attorney at Law
1708 23rd Avenue
P.O. Box 1945
Gulfport, MS 39502
(601) 868-7701

STATE OF MISSISSIPPI
COUNTY OF HARRISON
CAUSE NO. A-3574

AFFIDAVIT
FILED JUNE 9, 1986

COMES NOW, JENNIE BELL, mother of LITTLE BOY BELL and LITTLE GIRL BELL, a/k/a SAMUEL SETH HOLYFIELD and MEGAN BETH HOLYFIELD, and after having been duly sworn by me, deposes and says as follows:

That I am the mother of LITTLE BOY BELL and LITTLE GIRL BELL, born on the 29th day of December, 1985, in Gulfport, Mississippi, and I do hereby reaffirm my Consent to Adoption for the above stated minor children to ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, and it is my wish that they remain the adoptive parents of said minor children. I do further state that said children were born in Gulfport, Mississippi and have never been at any time on the Choctaw Indian Reservation in Neshoba County, Mississippi and it is my desire that said children remain in Gulfport, Mississippi, with ORREY CURTISS and VIVIAN JOAN HOLYFIELD.

It is further my wish that any legal proceedings or matters concerning said minor children be held in the Chancery Court of Harrison County, Mississippi, and not on the Choctaw Indian Reservation in Philadelphia, Mississippi.

SO DEPOSED, this the 31st day of May, 1986.

/s/
JENNIE BELL

STATE OF MISSISSIPPI
COUNTY OF NESHOBA

PERSONALLY appeared before me, the undersigned authority in and for the aforesaid County and State, JENNIE BELL, who, after being first duly sworn, states on her oath that the matters, facts and things contained in the above and foregoing affidavit are true and correct as stated therein.

/s/ Arthur C. Sharp Jr.
NOTARY PUBLIC

My Commission Expires:
8-8-89

STATE OF MISSISSIPPI
COUNTY OF NESHOBA

REAFFIRMATION OF CONSENT TO ADOPTION
FILED JUNE 9, 1986

I, the undersigned, WINDELL JEFFERSON, an adult resident citizen of the Choctaw Indian Reservation in Neshoba County, Mississippi, do hereby reaffirm my Consent to Adoption given on the 11th day of January, 1986. A copy of said consent is attached hereto as Exhibit "A," and made a part hereof as though fully copied in words and figures. I do further state that it is my wish that the minor children, LITTLE GIRL BELL and LITTLE BOY BELL, remain with the adoptive parents, ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD. Further, I do hereby certify that said children have been domiciled since their birth in Harrison County, Mississippi, and have never at any time resided elsewhere. Further, it is my desire that any legal proceedings or matters concerning said children be held in the Chancery Court of Harrison County, Mississippi and not on the Choctaw Indian Reservation in Neshoba County, Mississippi.

WITNESS my signature, this the 31st day of May, 1986.

/s/
WINDELL JEFFERSON

STATE OF MISSISSIPPI
COUNTY OF NESHOBA

PERSONALLY appeared before me, the undersigned authority in and for the aforesaid County and State, WINDELL JEFFERSON, who, after being first duly sworn, states on his oath that the matters, facts, and things contained in the above and foregoing Reaffirmation of Consent to Adoption are true and correct as stated therein.

/s/ Arthur C. Sharp, Jr.
NOTARY PUBLIC

My Commission Expires:
8-8-89

EXHIBIT "B"

STATE OF MISSISSIPPI
COUNTY OF NESHOBA

CONSENT TO ADOPTION
FILED JANUARY 16, 1986

I, the undersigned, WINDELL JEFFERSON, an adult resident non-citizen of the City of Philadelphia, State of Mississippi, the natural father of LITTLE BOY BELL and LITTLE GIRL BELL, born December 29, 1985, both minors, do hereby grant unto ORREY CURTISS HOLYFIELD, and VIVIAN JOAN HOLYFIELD, the absolute right to the care, custody, contr:', service and earnings of said minors.

It is further understood that I hereby disclaim any further responsibility for the care and support of said minors and that said minors cannot be reclaimed by me.

After due consideration and believing that the best interest of said minors will be promoted by their being placed with the said ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, I do fully, finally, completely and absolutely consent to the adoption of said minors by said party, without further notice with the same force and effect as though I personally were present and gave such consent at the time of the adoption, expressly waiving the right to notice of any adoption hearing.

I further give and grant unto the said ORREY CURTISS HOLYFIELD and VIVIAN JOAN HOLYFIELD, the right of guardianship of said minors with the same parental control and authority that I would have, had I retained custody of said minors.

WITNESS MY SIGNATURE, this the 11th day of January, 1986.

/s/
WINDELL JEFFERSON

STATE OF MISSISSIPPI

COUNT OF NESHOBA

SWORN to and subscribed before me, this the 11th day of January, 1986.

/s/ Arthur C. Sharp, Jr.
NOTARY PUBLIC

My Commission Expires:
8-8-89

EXHIBIT "C"

TRANSCRIPT OF TESTIMONY

MR. ALFORD: If your honor, please, I have here a certificate from Robert Benn, Superintendent of the United States Department of Interior, Bureau of Indian Affairs, Choctaw Agency, Philadelphia, Mississippi, dated December 30th, 1985, Certificate of Degree of Indian Blood of Johnny Lou Bell showing that she is listed on the Mississippi Band of Choctaw Indians Census Roll of 1940, the official record of this audit being 44 which means full degree of Choctaw Indian Blood on Roll No. 4354, with a birth date of 11-4-61.

THE COURT: Any objection to that?

MR. MILLER: Yes, sir. I object, Your Honor. It is not properly certified.

THE COURT: What we are going to have to do, Gentlemen, under these conditions, we are going to have to take testimony. I mean, if Mr. Miller is denying that these people are Indians, then we have got to do something to get that established.

MR. MILLER: Your honor, I am not denying that they are Indians. I am just denying whether this is a proper certificate or not.

THE COURT: Well, will you stipulate that Ms. Bell and Mr. Bell are Indians?

MR. MILLER: Yes, sir. I will do that.

THE COURT: What about Mr. Jefferson?

MR. MILLER: I don't know, Your Honor. I don't know whether he is or not.

THE COURT: Do you have anything else, Mr. Alford?

MR. ALFORD: I don't at this time. I would like to submit some authorities on that along with my brief, duly authenticated.

THE COURT: All right, as long as it is stipulated that Ms. Bell is a member of the Choctaw Tribe, I think that would be sufficient.

MR. ALFORD: Indulge me just a moment. Your Honor, that concludes our introduction.

IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE ADOPTION OF
SAMUEL SETH HOLYFIELD AND
MEGAN BETH HOLYFIELD

A-3574

NOTICE OF APPEAL
FILED AUGUST 11, 1986

NOTICE IS HEREBY GIVEN by the Mississippi Band of Choctaw Indians of the State of Mississippi, a duly recognized Indian Tribe organized and existing by virtue of the laws of the United States and America, Bureau of Indian Affairs, that the Court's Final Judgment filed in this cause on the 30th day of July 1986, is being appealed to the Mississippi Supreme Court.

The Intervenor and Respondent, Mississippi Band of Choctaw Indians of the State of Mississippi, by and through its attorneys, hereby designate the following as the record on appeal:

1. All pleadings filed in this cause;
2. All matters of record preliminary to the actual trial of this cause, including the matters of record made, all exhibits, and all notices;
3. The entire transcript taken and recorded by the Court Reporter;
4. All stipulations;
5. The Court's Opinion and Final Judgment.

Respectfully submitted

MISSISSIPPI BAND OF CHOCTAW INDIANS
OF THE STATE OF MISSISSIPPI

/s/
By: HERMAN ALFORD
ITS ATTORNEY

(5)

No. 87-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS,
Appellant,

v.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,
Appellees.

On Appeal From the Supreme Court of Mississippi

BRIEF FOR THE APPELLANT

EDWIN R. SMITH
Box 839
Philadelphia, Mississippi 39350
(601) 656-5251
Counsel for Appellant

July, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Do Mississippi Courts have jurisdiction over adoptions of Indian children whose natural parents are residents of and domiciled on an Indian Reservation?

A. Does a state court requirement of physical presence within and parental consent to children's acquisition of their parents' residence and domicile unlawfully infringe upon the special federal/tribal relationship reflected in the ICWA when applied to Indian children of reservation parents?

B. Does the definition of residence or domicile of Indian children for purposes of the Indian Child Welfare Act turn on a state or federal definition?

LIST OF PARTIES

The Appellant is the Mississippi Band of Choctaw Indians, an Indian Tribe duly organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, 48 Stat 986, 25 U.S.C. § 467. Respondents are all individual persons.

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IN THE

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IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS,
Appellant,

v.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

OPINIONS BELOW

The Opinion of the Supreme Court of Mississippi (JS. App. E, pp. 11a-18a) is reported at 511 So.2d 918 (Miss. 1987). The Opinion of the Chancery Court of the First Judicial District, Harrison County, Mississippi (JS. App. 10a-11a) is not reported.

JURISDICTION

This Court is believed to have jurisdiction as an appeal pursuant to 28 U.S.C. § 1257(2) and/or as a

Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(3) and 28 U.S.C. 2103. In its order of April 23, 1988, the Court postponed the question of jurisdiction, so it is briefed below under Argument Part I. In the alternative, the Court is requested to take jurisdiction over the case on certiorari pursuant to 28 U.S.C. § 1257(3) and 28 U.S.C.§ 2103. The judgment of the Supreme Court of Mississippi was entered on August 5, 1987, *rehearing denied*, September 16, 1987. A Notice of Appeal to this Court was filed with the Supreme Court of Mississippi on December 14, 1987, and the appeal was docketed on December 15, 1987.

LAWS INVOLVED

The following are set out in the Appendix to this brief:

1. The Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, 1902, & 1911.

2. Mississippi Adoption Act § 93-17-3, Mississippi Code Annotated of 1982, as amended.

STATEMENT

This is an action by an Indian tribe seeking to have a state adoption decree vacated and set aside for want of jurisdiction because the twin Mississippi Choctaw infants who were the subject of this adoption by a non-Indian couple were the natural children of Indian parents who both were at all times relevant to these proceedings residents and domiciliaries of the Choctaw Indian Reservation in Mississippi.

Appellant Mississippi Band of Choctaw Indians is a federally recognized Indian tribe in the State of Mississippi. On March 31, 1986 Appellant filed a Motion to Vacate and Set Aside the Final Decree of Adoption in a state adoption proceeding of twin Mississippi Choctaw infants by a non-Indian couple. Both the natural mother and the putative father are full-blooded Mississippi Choctaw Indians enrolled at the Federal Indian Agency at Philadelphia, Mississippi, and are residents of and domiciled on the Choctaw Indian Reservation. The adopting non-Indian parents reside in Harrison County, Mississippi about 200 miles south of tribal headquarters. Mississippi is a non-Public Law 280 State and the federal/tribal jurisdiction over the Choctaw Indian Reservation was recognized by this Court in *United States v. John*, 437 U.S. 634 (1978).

B.B. and G.B. are Choctaw Indians of the full blood and eligible for enrollment in the Mississippi Band of Choctaw Indians[1]. They were born unto J.B., their natural mother on December 19, 1985 in Harrison County, Mississippi where the mother had travelled to give birth. A Consent to Adoption was executed by J.B. on January 10, 1986. The Consent to Adoption by the putative father, W.J., was executed on the 11th day of January, 1986, but was not certified by the Judge until June 3, 1986, long after the May 21st, 1986 hearing date on Appellant's Motion.

The Decree of Adoption was rendered on the 28th day of January, 1986.

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[1] Appellees have acknowledged both the children's Indian blood quantum and their eligibility for enrollment in the Mississippi Band of Choctaw Indians at P. 3 of their Motion to Dismiss Appeal and to Deny Petition for Writ of Certiorari.

Appellant Mississippi Band of Choctaw Indians, which had at no time been notified or served with process, filed its Motion to Vacate and Set Aside the Final Decree of Adoption on March 31, 1986. After the motion was filed and heard on May 21, 1986, another affidavit was given by the natural mother, J.B., and filed June 9, 1986. A Reaffirmation of Consent of Adoption was filed by W.J., putative father, on June 9, 1986. The Harrison County Chancery Court entered its Opinion overruling the motion on July 14, 1986, and a Decree was entered on July 30, 1986.

Appellant opposed the adoption petition filed by non-Indian Petitioners Orrey Curtiss Holyfield and Vivian Joan Holyfield in the Chancery Court of Harrison County, State of Mississippi by filing a Motion to Vacate and Set Aside the Final Decree of Adoption. (JS. App. B) The Motion asserted that the minor children of the natural mother residing on the Choctaw Indian Reservation were subject to the exclusive jurisdiction of the Mississippi Band of Choctaw Indians Tribal Court under preemptive federal law. Those laws were enacted to protect the tribe and its members from assertions of state jurisdiction concerning matters arising on the Choctaw Reservation. 25 U.S.C. § 1911(a).

After briefing and argument the Chancery Court for the First Judicial District of Harrison County, Mississippi decided it had jurisdiction to decide these adoption proceedings. Its judgment is set forth in JS. App. C and its Opinion in JS. App. 2. The court found that the Indian Tribe never obtained exclusive jurisdiction over the children because they were born outside the confines of and had never resided on or been physically on the Choctaw Indian Reservation.

Appellant prosecuted an appeal to the Supreme Court of Mississippi, which affirmed the adoptions and issued the Opinion reproduced in the Appendix E to the Jurisdictional Statement. Appellant maintained on appeal that federal statutes, i.e., The Indian Child Welfare Act, 25 U.S.C. § 1901 et seq.; the United States Constitution, Art I, Sec. 8, Cl 3; and the laws of the United States established principles, which were preemptive of state jurisdiction. *United States v. John* 437 U.S. 634 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974). The essential basis of the Mississippi Supreme Court's Opinion was that minors do not acquire the legal residence and domicile of their parent(s) in the absence of the child's actual physical presence in such location and if to do so would be contrary to the parental desires. The ruling, as applied to Indians, constitutes an infringement by the State of Mississippi in the historical and federal statutory exclusive jurisdiction the Appellant tribe possesses in regulating the domestic relations of its members and residents.

SUMMARY OF ARGUMENT

No. 87-980 meets the statutory requisites for an appeal under 28 U.S.C. § 1257(2). This court has reviewed many cases where federally-protected Indian rights were denied by state courts by writ of error and by the modern appeal procedure. Furthermore, the other requisites of jurisdiction on appeal are clearly met. Alternatively, review would nonetheless be appropriate under 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103.

Exclusive tribal court jurisdiction over these adoptions is grounded in the express language of the In-

dian Child Welfare Act of 1978, Pub. L. 95-608, 25 U.S.C. §§1901-1963, and more specifically in subsection 101(a) of the law, 25 U.S.C. §1911(a). The legislation is designed to comprehensively provide protections to Indian families and their tribes against the proliferation of wrongful removals of their children from their homes and their culture. Congress enacted this law as a response to the alarmingly high rate of Indian family break-ups, often unwarranted, and adoptions by non-tribal public and private agencies and out of a perceived failure on the part of the states to recognize the essential tribal relations of Indian people and the culture and social standards prevailing in Indian communities and families. The legislation codifies an expansive tribal jurisdiction basis in adoption, removal and termination proceedings. As pertains to exclusive tribal court jurisdiction over Indian children resident and domiciled on the reservation, the Act embodies the conclusion suggested by and consistent with numerous decisions of this Court and the intent of Congress as indicated through the legislative history.

By contrast, the decision below seeks to carve an exception to this jurisdictional statute based on an imputation of special state requirements for residence and domicile which would render a major protection of the Act largely powerless. The ruling below substitutes a factual determination for a legal conclusion; disregards its own precedent; ignores rulings of this Court which have previously expressly renounced applications of state criminal laws upon the Choctaw reservation and disregards precedents of this Court extending the ruling to applications of state civil laws. To the extent it constitutes a "subject matter" as

opposed to a"territorial" jurisdictional determination it violates this Court's "infringement doctrine" and ignores the tribal sovereignty of Appellant. By an alternative approach based on a common law application of abandonment, it cannot be sustained in light of 25 U.S.C. § 1913(c) and, in any event under case rulings of other courts interpreting same, would have to give way in its application under a federal preemption analysis.

Application of states' residence and domicile standards would, as here, produce discriminatory effects on reservations, could result in a multiplicity of standards on a single reservation and would undermine a nationwide rule of law. This Court has recognized that local rules cannot be used or implemented to defeat federal statutes and the definition of residence and domicile of Indian children for purposes of the ICWA can only turn on a federal rather than a state definition. No reason exists to apply a state rule of state residency and domicile to a federal law on reservation residency and domicile and the results would be troublesome and should be rejected.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER 87-980 AS AN APPEAL

In its order of May 23, 1988, the Court postponed the question of jurisdiction in No. 87-980 to the hearing of the case on the merits. 56 U.S.L.W. 3805. In the discussion following, appellant supports jurisdiction over this case as an appeal.

28 U.S.C. § 1257(2) confers jurisdiction over appeals from the highest court of a state "where [there] is drawn in question the validity of a statute of any

state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." Involved in the present case is the Mississippi state courts' application of the state adoption statute, Miss.C.Ann. § 93-17-3, to the adoption of twin Indian infants born to Mississippi Choctaw parents, both of whom were residents and domiciliaries of the Choctaw Indian Reservation. Appellant by Motion to Vacate and Set Aside Final Decree of Adoption and on appeal contended that state jurisdiction to apply this adoption statute to these tribal children of reservation parents was preempted by the federal laws governing adoptions and placements of Indian children. (Appellant's contentions will be further elaborated upon in the remainder of this brief.) Appellant has drawn into question the validity of the Mississippi adoption statute as applied to these twin tribal children and has done so on the ground that its application is repugnant to Supremacy Clause of the Constitution, art. VI, § 2 and the court below ruled in favor of the statute's validity.

The Court has held that Section 1257(2) applies to cases where the issue is the validity of a state statute as applied, as well as where the issue is the validity of the statute on its face.[2] The instant cases presents a claim that Mississippi's adoption laws are invalid under the Supremacy Clause whenever applied to Indian children who are deemed by federal law to be resident and domiciled on an Indian reservation apart from state jurisdiction. Appellant's claim is generic

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[2] *Bantam Books v. Sullivan*, 372 U.S. 58, 61 n.3 (1963); *Fisher v. Kansas* 274 U.S. 380, 385 (1927); *Dahnke Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

and not dependent on the particular form of application of state adoption laws herein and thereby escapes the limitation in two other lines of cases of this court which hold that an appeal does not lie where the claim is of an erroneous exercise of authority under a valid statute,[3] or that an otherwise valid statute is being applied discriminatorily in violation of the Constitution.[4]

This Court has historically reviewed cases on appeal where the federal rights accorded Indians conflicted with state law and a state court had ruled in favor of the state law position. Initially this review was by writ of error, the predecessor to today's modern appeal procedure.[5] In more recent times this Court has accepted jurisdiction on appeal in these case situations.[6] Even though on occasion other such cases

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[3] *Philadelphia & Reading Coal & Iron Co. v. Gilbert* 245 U.S. 162 (1917).

[4] *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182 (1945).

[5] *Sizemore v. Brady*, 235 U.S. 441 (1914); *Choate v. Trapp*, 224 U.S. 665 (1912); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *McKay v. Kalyton*, 204 U.S. 458 (1907); *Spalding v. Chandler*, 160 U.S. 394 (1986); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867) (3 cases); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); see also *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1859); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1857).

[6] *Antoine v. Washington*, 420 U.S. 194 (1975); *Tonasket v. Washington*, 411 U.S. 451 (1973); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Tulee v. Washington*, 315 U.S. 681 (1942).

have been reviewed on certiorari, this appears to be based solely on the election of petitioning counsel.[7]

This case also clearly meets the other requisites of jurisdiction on appeal. There is a final judgment of the highest court of the state; federal questions which were decided by that court are presented; and the questions presented are substantial as ensuing portions of discussions throughout this brief should make clear. Jurisdiction based upon 28 U.S.C. § 1257(2) is therefore properly grounded.

Alternatively, on the basis of the analysis above, review would nonetheless be appropriate under 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103.

II. MISSISSIPPI COURTS LACK JURISDICTION OVER ADOPTIONS OF INDIAN CHILDREN WHOSE NATURAL PARENTS ARE RESIDENTS OF AND DOMICILED ON AN INDIAN RESERVATION.

A. Background to and General Purposes and Provisions of the Indian Child Welfare Act of 1978 Applicable to this Case.

The Federal statutory investiture of exclusive tribal court jurisdiction over adoptions of reservation resident or domiciled Indian children is found within the Indian Child Welfare Act of 1978, Pub. L. 95-608, 25 U.S.C. §§ 1901-1963. Subsection 101(a) of the law, 25 U.S.C. § 1911(a), provides in relevant part: "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the

[7] E.G., *Williams v. Lee*, 358 U.S. 217 (1959).

reservation of such tribe . . ."[8] In vesting exclusive jurisdiction in the tribal court, the statute also manifests a clear intent that state courts be divested of any comparable adoption jurisdiction that might otherwise be claimed. As is discussed more fully in Part III and IV, infra, general governing principles and prior decisions of this Court suggest that state jurisdiction over such adoptions would nowise lie.

The ICWA responds to a nationwide epidemic of Indian family break-ups by non-tribal public and private agencies that Congress declared, "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5). Statistics provided at congressional hearings documented the shocking percentages and patterns of Indian children placements.[9] Consequently the Act

[8] 25 U.S.C. § 1911(a) reads in its entirety:

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

Mississippi has been recognized by this Court as a non-Public Law 280 state lacking jurisdiction over the Choctaw Reservation. *U.S. v. John*, 437 U.S. 634 (1978). Regarding the provision on wards of tribal courts, neither child has been declared a ward of the Choctaw tribal court.

[9] Surveys of States with large Indian populations conducted by the Association of American Indian Affairs (AAIA) in 1969

pronounces "that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal Standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . ." 25 U.S.C. 1902. Although the exclusive tribal court adoption jurisdictional provision, 25 U.S.C. § 1911(a), is but part of the comprehensive statutory pattern in implementation of this national Indian policy, it codifies the jurisdiction extant in tribal courts and ascertains that no such concurrent jurisdiction remains residual in

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and again in 1974 indicate that approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some States the problem is getting worse: In Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and, in 1971-72, nearly one in every four Indian children under one year of age was adopted.

The disparity in placement rate for Indians and non-Indians is shocking. In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare since 1967-68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The number of South Dakota Indian children living in foster homes is per capita, nearly 16 times greater than the non-Indian rate. In the State of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 per cent greater than it is for non-Indian children. Just as Indian children are exposed to these great hazards, their parents are too.

H.R. Rep. No. 1386, 95th Cong. 2d Sess. 21 (1978), *reprinted in* 1978 U.S. Cong. & Ad. News 7530, 7536.

state courts. Except in Mississippi the statute presumably serves as an effective shield against covert jurisdictional incursions into "Indian Country" and tribal reservation populations.[10] It therefore stands as the primary bulwark to the closest and most fundamental of tribal relationships and cultural involvements; that of reservation existence.

The Mississippi courts' decisions, however, would seek to remove this protective shield against covert state jurisdictional incursions into "Indian Country" and tribal reservation populations by fashioning special state requirements for residence and domicile of minor children apart from that of their natural parent(s). That approach disregards the legislative history and intent of the ICWA, established principles of federal Indian law and decisions of other courts interpreting the question.

III. MISSISSIPPI COURTS' REQUIREMENTS OF PHYSICAL PRESENCE WITHIN AND PARENTAL CONSENT TO CHILDREN'S ACQUISITION OF THEIR PARENTS' RESIDENCE AND DOMICILE UNLAWFULLY INFRINGE UPON THE SPECIAL FEDERAL/TRIBAL RELATIONSHIP WHEN APPLIED TO INDIAN CHILDREN OF RESERVATION PARENTS.

The Mississippi courts' rationale in support of their determination of state jurisdiction over these Indian adoptions suffers from what might best be termed a

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[10] Given the confidentiality of adoption proceedings, the possibility cannot be absolutely ruled out that other states are secretly granting adoptions of reservation Indians under circumstances similar to those of this case. Neither can it be verified that Mississippi has not granted other such Indian adoptions and published its most recent standard for minor's residence and domicile only upon appellate challenge.

"forked jurisprudence." The court below initially identifies its operative variable for deciding jurisdiction saying: "The key language on which the case at bar turns is the requirements [sic.] that the Indian child reside or be domiciled within the reservation of the tribe." 511 So. 2d at 921. In a swift mixing together of issues of fact with issues of law, however, the court then observes that "At no point in time can it be said the twins resided on or were domiciled within the territory set aside for the reservation. Id.

By claiming a factual observation as its legal basis of departure, the court below disregards its own most recent prior pronouncement of caselaw on minors' residence or domicile—*In Re Guardianship of Watson*, 317 So.2d 30 (Miss. 1975). In the *Watson* case the court had firmly maintained:

> The law is unchallenged that the residence of a minor is that of his parents and remains so during the period of minority in spite of the temporary absence at school or elsewhere. (317 S.2d at 32.)

The court below's opinion also quickly dispatches Appellant's reliance upon the same rule of law in two prior cases—*Boyle v. Griffin*, 84 Miss. 41, 36 So. 141 (1904); and *Stubbs v. Stubbs*, 211 So.2d 821 (Miss. 1968) by claiming distinguishabilities questionable in their probative worth.[11]

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[11] Regarding *Boyle* the Mississippi Supreme Court explained: "the thrust of that case was towards a determination of the inability of their children therein to change their domicile from that of their parents during their minority, and, if the parents changed their domicile, that of the children follows it." 511 So.2d at 921. Yet the two children, Algie and Elmer Tryon, whose lawful domicile was at issue in *Boyle* were adjudged to have acquired their father's Memphis, Tennessee domicile notwithstanding that they had never left the State of Mississippi.

The court hailed *Stubbs* as precedent for its holding that intent is one determinative factor in establishing domicile; yet there involved was ones intent to establish ones own residency and domicile rather than disestablishing ones child's as would otherwise be affixed by common law.

The subtlety of the court below's mixture of fact for law might go unnoticed and unchallenged, but for the reoccurrence of a past practice; that of attempting the application of state laws to Indians on reservation. Barely a decade ago this Court had occasion in *United States v. John*, 437 U.S. 634 (1978) to reject attempts of Mississippi's courts to criminally prosecute a Choctaw father and son under state law on charges arising from an incident occurring on the Choctaw Reservation. This Court unanimously held that the lands collectively comprising the Choctaw Reservation in Mississippi constitute "Indian County" as defined in 18 U.S.C § 1151(a) and as used in 18 U.S.C. § 1153 and that these federal statutes operated to preclude state exercises of criminal jurisdiction over the Indian accused.

This Court has also stated that the federal "Indian Country" definition governing applications of federal criminal jurisdiction generally apply also to questions of federal civil jurisdiction and to tribal jurisdiction. *DeCoteau v. District Court*, 420 U.S. 425, 427 n.2 (1975). See also *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478-479 (1976)

The cumulative surmisal from these authorities is, clearly, that Mississippi courts lack power to apply Mississippi's laws, whether statutory or decisional and

whether criminal or civil, to tribal Indians within the limits of the Choctaw Reservation.

The issue beclouds in noting that the state courts below adjudicated the residence and domicile of Indian children *of the reservation*, by divesting under state law their residence and domicile *within the reservation.*[12] Nonetheless, the operative effect is the same in that it constitutes an application of state law to Indians and to their status at state law on reservation

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[12] Actually, the opinion is unclear as to whether it is determining initially that the children do not qualify as reservation residents and domiciliaries and are thereby enabled to be adopted in state court, or whether it is determining initially that the children qualify concurrently as Mississippi residents and domiciliaries and as such are enabled to be adopted in Mississippi's courts.

The latter approach, whether characterized as a State's Rights or as an individual Indian's Rights theory, was flatly dismissed when this Court wrote in *Fisher v. District Court*, 427 U.S. 382, (1976):

> "Finally we reject the argument that denying the Runsaboves access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton v. Mancari*, 471 U.S. 535 (1974)
>
> (424 U.S. 390-391.)

(The remainder of this brief is premised on the ›rmer proposition of the lower courts opinion.)

in disregard of the *John* ruling and other precedent of this Court. See, e.g., *Fisher v. District Court*, 424 U.S. 382 (1976). Furthermore, in the *Fisher* decision this Court cast grave and possibly fatal doubt on the ability of state courts to rule on adoptions such as these *sub judice* in the first instance, and that additional claim is also raised by appellant. In *Fisher* this Court held that state courts lack subject matter jurisdiction over adoptions of Indian children when all of the parties live on reservation and are all Indians.

Bolstering the "territorial" argument, grounded in *John, supra.*, for rejecting these state court adjudications of non-reservation residency and domicile, is the established "infringement doctrine" of *Williams v. Lee*, 358 U.S. 217 (1959). Under that doctrine the lower court's divestiture, by application of Mississippi law, of these tribal children's reservation residency and domicile status unlawfully impinges upon a specialized area of tribal government. The test of *Williams v. Lee, supra.*, set forth within the context of a decision that an Arizona State Court did not have jurisdiction over a suit brought by a non-Indian store owner on the Navajo Reservation against a Navajo Indian on a debt, is as follows:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.
> (358 U.S. at 220.)

This Court has repeatedly recognized tribal groups as a "separate people, with the power of regulating their internal and social relations," *United States v. Kagama*, 118 U.S. 375, 381-382 (1886); see also *United*

States v. Wheeler, 435 U.S. 313 (1978); and having the power to make their own substantive law in internal matters, see *Roff v. Burney*, 168 U.S. 218 (1897); including, for example, membership eligibility, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); domestic relations, *United States v. Quiver*, 241 U.S. 602 (1916); and reservation adoptions, *Fisher v. District Court*, 424 U.S. 382 (1976).

It is doubtful that many activities exist of more fundamental importance to the right of reservation Indians to make their own laws and be ruled by them than is the right to establish its own standards for reservation residence and domicile—including for its minor children. Clearly the impingement of the Mississippi courts in this case has been in direct violation of the infringement doctrine and of the appellant's tribal sovereignty. It cannot be sustained consistently with established principles of Indian law.

The second branch to the "forked jurisprudence" reflected by the Mississippi Supreme Court's opinion lies in its comment that the children "were voluntarily surrendered and legally abandoned" off the reservation in Harrison County, Mississippi. Seemingly the court below in making this observation was impliedly seeking to invoke the rule of law of abandonment as an exception to the general, common law interpretation that the residence of minor children follows that of the natural parent(s). *See*: 25 *Am.Jur.2d* § 63 (1966) and *Restatement (Second) of Conflict of Laws*, § 22, comment c (1971). Generally if the parents abandon the child then the child acquires the domicile of the party who stands *in loco parents* to him or her and with whom the child was placed with an intent to relinquish all parental rights and obligations.

Notwithstanding the executions of parental consent by the natural parents (JA-9, 12, 18, 20, & 21), abandonment as a matter of law could not consummate at any time prior to the instant of entry of the final decree of termination or of adoption. The reason is that Subsection 103(c) of the Act, 25 U.S.C. § 1913(c) provides:

> (c) *Voluntarily termination of parental rights or adoptive placement; withdrawal of consent; return of custody*
>
> In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.
> (25 U.S.C. § 1913(c).)

Since the courts determine jurisdiction in advance of their rendition of a final decree, a determination of reservation domicile would have preceded the consummation at law of any parental intent to abandon.

Another, more recognized approach to the same conclusion that state abandonment law must give way to the application of the ICWA in this case is found in a pre-emption analysis. Pursuant to that analysis, the broad assertion of state regulatory authority over tribal reservations and members may be pre-empted by federal law under the Supremacy Clause of the Constitution, art VI, § 2. See, e.g., *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)."Although a State

will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-emption, [this Court has] cautioned that our prior cases did not limit pre-emption of state laws affecting Indian tribes to only those circumstances. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, at 333-334 (1983). "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emptions that have emerged in other areas of the law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 475 (1976).

Given this heightened standard of preemption applicable to Indian legislation, the question becomes whether the ICWA's provisions operate to preempt application of state abandonment laws which would otherwise change the residence and domicile of these Indian children from that of their natural parent(s) to that of Harrison County, Mississippi.

The Supreme Court of Utah was confronted with a similar posturing in determining the residence and domicile of a nine-year-old Navajo from the Navajo reservation in Churchrock, New Mexico and reached the conclusion that under federal preemption analysis abandonment law could not be applied. Captioned *Matter of Adoption of Halloway*, 732 P.2d 962 (Utah, 1986), the Utah Supreme Court upheld the trial court's finding that the natural mother abandoned the child in Utah. Observing that "[u]nder traditional rules of law Jeremiah's domicile would have changed from the reservation to Utah County at that time", 732 P.2d at 967, the court nonetheless concluded that "state law must bow when the application of that law brings the state and federal policies into conflict. See, e.g. *Perez v. Campbell*,

402 U.S. 637, 649, 91 S.Ct. 1704, 1711, 29 L.Ed.2d 233 (1971)." *Id.*

Thus on both tenets of its "forked jurisprudence" the court below has managed to simultaneously befoul its ruling with both barriers to assertions of state regulatory authority over tribal reservations and members which this Court identified and summarized in *White Mountain Apache Tribe v. Bracker, supra*, as follows:

> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art 1, § 8, cl 3. See *United States v. Wheeler, supra*, at 322-323. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. See, e.g., *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, (1965); *McClanahan v. Arizona State Tax Comm'n, supra*. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, (1959). *See also Washington v. Yakima Indian Nation*, 439 U.S. 463, 502, (1979); *Fisher v. District Court*, 425 U.S. 382 (1976) (per curiam); *Kennerly v. District Court of Montana*, 400 U.S. 423, (1971). The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are re-

lated, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," *McClanahan v. Arizona State Tax Comm'n, supra*, at 172 against which vague or ambiguous federal enactments must always be measured.
(448 U.S. 143-144.)

IV. THE DEFINITION OF RESIDENCE OR DOMICILE OF INDIAN CHILDREN FOR PURPOSES OF THE INDIAN CHILD WELFARE ACT TURNS ON A FEDERAL RATHER THAN A STATE DEFINITION.

"Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation . . . Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied." *Williams v. Lee*, 358 U.S., at 220-221 (footnote omitted), as quoted in *McClanahan v. Arizona State Tax Comm'n*, 448 U.S. at 174-175, fn. 3. Clearly, 25 U.S.C. § 1911(a) contains no expressed grant to states of such jurisdiction to define reservation residence and domicile.

Notwithstanding the lack of any expressed conferral of state power to define residence and domicile within the reservation for ICWA purposes, the courts below applied state standards to adjudge the children non-reservation residents and domiciliaries. That action fashioned a claimed ambiguity into the otherwise clear

application of federal law defining residence and domicile. Appellant regards the applicable statute in this case as reasonably clear and free from doubt but to the extent that any doubts or ambiguities should exist in 25 U.S.C. § 1911(a), it is well established that they are to be resolved in favor of the Indians. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). The Court has applied this rule to favor federal protection and tribal self-government over competing state jurisdiction. *Bryan v. Itasca County*, 426 U.S. 373, 392-393 (1976); *McClanahan v. Arizona Tax Com'n*, 411 U.S. 164, 174-175 (1973); see *United States v. Kagama*, 118 U.S. 375, 384 (1886). "Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143-144.

The ruling below also ignores the legislative history to the ICWA. H.R. Rep. No. 1386, 95th Cong. 2d Sess. 21 (1978), *reprinted in* 1978 U.S. Cong. & Ad. News 6530, 7540-75. That legislative history notes of the Section 101(a), 25 U.S.C. § 1911(a), provision that it "confirms the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation" see H.R. Rep., No. 1886, 95th Cong., 2d Sess. 21, reprinted in 1978 U.S. Cong. and Ad. News, at 7544,—and cites among other cases; *Wisconsin Band of Potowatomies v. Houston*, 393 F. Supp. 719 (D.W.D. Mich., 1973). In that case a Wisconsin probate court's jurisdiction was overturned notwithstanding that an uncle had sought custody of the Indian children there after their parents' off-reservation deaths. Though

mother and children had in previous months lived in various off-reservation locations, the parents were not legally separated and the father's last permanent residence was on reservation. The court held that the children acquired the residence and domicile of their natural father and ruled that, as regards the uncle's petitioning of the probate court, the actions of an individual Indian "cannot create subject matter jurisdiction of Indian affairs in a state court." 393 F.Supp. at 733.

The ICWA underwent various rewrites before final passage. One early draft introduced before Congress on November 4, 1977, explains, as regards that portion enacted in altered form as Section 101(a), that "For purposes of this Act, an Indian child shall be deemed to be a resident of the reservation where his parent or parents *** is resident." *124 Cong. Rec.*, Part 19, at Page 37,224 (Nov. 4, 1977). Notwithstanding considerable redrafting and an extensive record of investigation and testimony to the final passage, nowhere can there be found any indication that any standard other than this federal interpretation apply.

Since passage of the Act, cases directly passing on the "resides or is domiciled" language of Section 1911(a) have included *In Re: Appeal in Pima County, Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (C.A. Ariz., 1981); *Matter of Adoption of Baby Child*, 102 N.M. 735, 700 P.2d 198 (C.A.N.M., 1985) and *Matter of Adoption of Halloway*, 732 P.2d 962 (Utah 1986) (discussed in Part III, supra). In the first of these two cases, an Assinaboine mother, herself a 15-year-old minor, gave birth out-of-state and executed a voluntary relinquishment for preadoption placement. The court traced the mother's, and thus

the child's, domicile to Montana in the following manner:

> Appellant [mother], an unemancipated minor, was domiciled within the Fort Belknap reservation in Montana as that was the domicile of her father. *** Her illegitimate child, however, took the domicile of her mother. * * * The domicile of an infant born out of wedlock remains that of its mother until a new one is lawfully acquired. * * * Although the child was living in Arizona with the prospective adoptive parents pursuant to a temporary custody order, its domicile had not yet been legally changed and therefore it was a domiciliary of the reservation in Montana. (Citations omitted.) 635 P.2d 187, at 191.

In the second case, *Matter of Adoption of Baby Child, supra*, the Pueblo mother of an illegitimate child attempted to place her child for adoption off-reservation through the New Mexico courts. The natural father and the Pueblo ultimately obtained state court dismissal for lack of subject matter jurisdiction on the grounds that an illegitimate child takes the domicile of its mother at the time of its birth. (*Halloway, supra*, as mentioned in Part III, also upholds reservation residence and domicile.)

Rulings of this Court have indicated in other contexts as well that state definitions should not apply when to do so would frustrate the purposes of federal statutes. In *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923), this Court wrote, for example, that:

> The law of the United States cannot be evaded by the forms of local practice ***. The local rule applied as to the burden of proof narrowed the protection that the defendant had secured (under Federal law), and therefore contravened the law.
> (263 U.S. at 21.)

Also in *Dice v. Akron, Canton & Younstown R.R. Co.*, 342 U.S. 359 (1959), this Court also held:

> Congress * * * granted petitioner a right * * * State laws are not controlling in determining what the incidents of this Federal right should be.
>
> (342 U.S. at 361.)

Applications of state definitions for residence and domicile would produce unworkable results. For example, to the extent the court below may have defined "non-reservation residency" it has potentially opened its courtroom doors under the state adoption statute, Section 93-17-3 Miss.C.Annot., to adoptions of Indian children nationwide upon their off-reservation birth. If, instead, a state's ability to define reservation residency and domicile extended only to reservation lands within its state boundaries, multi-state reservations such as the Navajo reservation would have those living within its boundaries subject to varying status' depending on their physical presence (or non-presence) at any given moment. For tribes with migratory reservation populations the results would be impossible.

Circumstances considered, the only practicable means for "the establishment [and maintenance] of

minimum Federal standards" (25 U.S.C. § 1902) through this otherwise comprehensive federal Indian legislation is by the recognition of federal standards of reservation residence and domicile. Only through the conduit of federal law, which recognizes tribal laws, *See, e.g. Williams. v. Lee*, 358 U.S. 217, can the fullest possible implementation be effected of the panapoly of rights, privileges, responsibilities and protections of our Indian children provided by this comprehensive enactment.

CONCLUSION

The Opinion below ignores federal statutes, numerous controlling decisions of this Court and is at odds with accepted principles of federal Indian law. The decision should be reversed and remanded with instructions to dismiss for lack of jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX

§ 93-17-3. Who may be adopted—who may adopt—venue of adoption proceedings—change of name.

Any person may be adopted in accordance with the provisions of this chapter in term time or in vacation by an unmarried adult or by a married person whose spouse joins in the petition, provided that the petitioner or petitioners shall have resided in this state for ninety (90) days preceding the filing of the petition, unless the petitioner or petitioners, or one of them, be related to the child within the third degree according to civil law, in which case such restriction shall not apply. Such adoption shall be by sworn petition filed in the chancery court of the county in which the adopting petitioner or petitioners reside or in which the child to be adopted resides or was born, or was found when it was abandoned or deserted, or in which the home is located to which the child shall have been surrendered by a person authorized to so do. The petition shall be accompanied by a doctor's certificate showing the physical and mental condition of the child to be adopted and a sworn statement of all property, if any owned by the child. Should the doctor's certificate indicate any abnormal mental or physical condition or defect, such condition or defect shall not in the discretion of the chancellor bar the adoption of the child if the adopting parent or parents shall file an affidavit stating full and complete knowledge of such condition or defect and stating a desire to adopt the child, notwithstanding such condition or defect. The court shall have the power to change the name of the child as a part of the adoption proceedings. The word "child" herein shall be construed to refer to the person to be adopted, though an adult.

Sources: Laws, 1973, ch. 361, § 1, eff from and after passage (approved March 23, 1973).

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibilities to Indian people, the Congress finds—

(1) That clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibilities for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes, than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in Indian tribe.

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have

often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902 Congressional declaration of policy

The Congress hereby declares that it is the policy of this nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1911 Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either

parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe. **Provided**, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

(10)

No. 87-980

In the Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS,
Appellant,

vs.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

APPELLEES' BRIEF

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December, 1988

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ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

APPELLEES' BRIEF

STATEMENT

Twin babies were born to J.B. on December 29, 1985 in Gulfport, Harrison County, Mississippi. The children were born out of wedlock to J.B. and W.J., the putative father, who are both full-blood Choctaw Indians. A petition for adoption was filed on January 16, 1986, by the Holyfields, who were joined in such by the natural mother. A consent to adoption form was executed by J.B., the natural mother, on January 10, 1986. A consent to adop-

tion form and reaffirmation thereof were filed by W.J., the putative father, on January 11, 1986, and June 13, 1986, respectively.

The Chancellor in the lower State Court issued the decree of adoption on January 28, 1986.

The Mississippi band of Choctaw Indians filed a motion to vacate and set aside the final decree of adoption on March 31, 1986.

Affidavits again reaffirming their consent to the adoption were filed by the natural parents, Appellees on May 31, 1986, and June 9, 1986. The content of these forms stated specifically that 1) the natural parents reaffirmed their consent to the adoption with 2) the adoptive parents to be the Holyfields 3) the children were born in Gulfport, Mississippi, and at no time ever been on the Choctaw Indian reservation in Neshoba County, Mississippi; 4) it is the desire of the natural parents that the children remain in Gulfport and with the Holyfields and that the proceeding be held in the Chancery Court of Harrison County, Mississippi.

On July 14, 1986 the lower Court overruled the band's motion and entered its decree on July 30, 1986.

The Mississippi Supreme Court then decided on August 5, 1987, that the Indian twins have never resided outside of Harrison County, Mississippi and were voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents and it is undisputed that the parents went to considerable efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi. The

Court further held that the domicile of B.B. and G.B. has been and continues to be Harrison County, Mississippi and the Court therein exercised proper jurisdiction over the children's adoption proceedings. The Mississippi Supreme Court further found that the proceedings in lower Court actually escaped applicable Federal law and child welfare but the Chancellor insured that the minimum Federal standards were met when the Court chose to exercise jurisdiction. The Mississippi Supreme Court noted the submission of various forms filed by the natural parents affirming and reaffirming their consent to the adoption. Almost three years has past since the decree of adoption was issued in the lower State Court in Mississippi, and as of the date of the writing of this brief no objection has yet been filed by either of the natural parents. Both natural parents are Appellees in this case which indicates their ongoing consent to the adoption.

SUMMARY OF ARGUMENT

Appellees would show that the Mississippi band of Choctaw Indians lacks standing to contest the adoption of the Choctaw children subject of this appeal as Article III, Section 2 of the Constitution of the United States as interpreted by this Court requires for purposes of standing, some actual threat and injury amenable to judicial remedy. Appellees would further submit that appellant has failed to show any reason for this Court to grant a Writ of Certiorari as there are no conflicts within the Circuits, there is not a matter before this Court which has not been or should be decided, and the decision in the Mississippi Courts is not in conflict with prior decisions of this Court and not in conflict with Indian rights as defined under the Indian Child Welfare Act of 1978.

Mississippi Courts have jurisdiction over the adoption of Indian children specified in Indian Child Welfare Act 1978, Pub. L. 95-608 specifically 25 U.S.C., Section 1913, which provides the minimum Federal standards for voluntary termination of parental rights for adoption purposes. If there were not a difference between a voluntary proceeding and an involuntary proceeding, an involuntary proceeding being defined under 25 U.S.C., Section 1912 there would be no reason for Congress to adopt or draw a distinction between Sections 1912 and 1913 of 25 U.S.C. To date, the natural parents, who are Appellees herein, have entered no objection to this proceeding. 25 U.S.C., Section 1911 (a) states that an Indian tribe shall have jurisdiction exclusive as to any state or any child custody proceeding involving an Indian child who resides or is domiciled in a reservation of such tribe. In the instant case the children have never resided or have never been domiciled on the reservation. Section 1911 (b) of the ICWA provides that any State Court proceeding for the foster care placement of or termination of parental rights to an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the Court, absent good cause to the contrary, should transfer such proceeding to the jurisdiction of the tribe *absent objection by the parent*. (Emphasis added) 25 U.S.C., Section 1913 permits application of State law to the adoption of Indian children not domiciled or residing on a reservation. Further, Section 1913, Subsection (b) provides that any parent may withdraw consent to the placement of their child under State law at any time and upon such withdrawal the child shall be returned to the parent or Indian custodian Section 1913 being merely and purely a voluntary proceeding requiring the consent of the natural parents.

The Indian Child Welfare Act of 1978, herein referred to as ICWA does not expressly define how domicile is to be established. The Bureau of Indian Affairs' guidelines for implementing the ICWA state that definitions of domicile were not included in the Act or the guidelines because these terms are well defined under existing State law. There is no indication that these State law definitions tend to undermine in any way the purposes of the Act. The Mississippi Supreme Court in this case has clearly stated that the domicile and residence of the children subject of this proceeding from the very first day of their lives has been that of the Holyfields in Harrison County, Mississippi.

There is no Federal definition of domicile or residence and the Mississippi Supreme Court in this case decided that the domicile of the two Indian children subject of this proceeding was from the first day of their lives and to the present date, Harrison County, Mississippi as neither of said children have ever spent one second of their lives on a reservation.

ARGUMENT

I.

Whether or Not This Court Has Jurisdiction Over 87-980 As an Appeal.

It appears in this Argument that Appellant is questioning the validity and the constitutionality of the Mississippi Adoption Act, Mississippi Code Anno., Section 93-17-3 to the adoption of twin Indian infants subject of this case. Appellees would show that in order for Appellant to preserve this question on appeal to this Court, the issue would have had to have been raised in the lower State Court proceedings and it was not. Appellant would also have this Court think that the adoption of Indian children can only take place through the Tribal Courts and the Tribal Courts have exclusive jurisdiction over the adoption of all Indian children. This position by Appellant, is totally unsupported by law and facts. Exclusive jurisdiction over the adoption and placement of Indian children is only conferred on the Tribal Courts under 25 U.S.C., Section 1911 which confers exclusive jurisdiction to the Indian tribe over any child custody proceeding involving an Indian child *who resides or is domiciled within the reservation* of such tribe. (Emphasis added) Appellees would point out that Section 1911 (b) states that in any State Court proceeding for the foster care placement of or termination of parental rights to an Indian child not domiciled or residing in a reservation of the Indian child's tribe, the Court in the absence of good cause to the contrary, should transfer such proceeding to the jurisdiction of the tribe, *absent objection by the parent*. (Emphasis added) 25 U.S.C., Section 1913

gives State Courts jurisdiction in voluntary proceedings as it specifically provides in Section 1913 (c) that proceedings for the termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be and the child shall be returned to the parent. Under Section 1913 (d), after the entry of a final decree of adoption of an Indian child in any State Court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the Court to vacate any such decree within two years after the date of the decree.

In support of Appellees' Argument Number One, and in opposition to Appellant's Argument Number One, Appellees would re-adopt their Motion to Dismiss Appeal and to Deny a Petition for a Writ of Certiorari which is on file at this time in Cause 87-980.

II.

Whether or Not Mississippi Courts Lack Jurisdiction Over Adoptions of Indian Children Whose Natural Parents Are Residents of and Domiciled on an Indian Reservation.

Appellees would agree that in Section 101 (a) of the Indian Child Welfare Act of 1978, Pub. L. 95-608, 25 U.S.C., Section 1911, that the Tribal Court would have exclusive jurisdiction over any Indian children domiciled or residing within its boundaries and reservation, however, such is not the case at hand. The twins in question were born in Harrison County, Mississippi in

Gulfport Memorial Hospital and have resided in Harrison County, Mississippi since the day of their birth through the date of this brief and have never "set foot" on any reservation. Appellees would again point out that the adoption proceeding before this Court was a voluntary proceeding as provided for under 25 U.S.C., Section 1913 and all of the minimum standards provided for in said section were complied with by Appellees. The Mississippi Supreme Court decision, dated August 5, 1987, held that Indian twins subject to this proceeding have never resided outside of Harrison County, Mississippi and were voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents and it is undisputed that the natural parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth in Gulfport Memorial Hospital, Harrison County, Mississippi and for their adoption in the Harrison County Court. The domicile of said twins has been and continues to be Harrison County, Mississippi and the lower State Court insured that the minimum Federal standards would be met as set forth in 25 U.S.C., Section 1913 in any event when the Court chose to exercise jurisdiction. The parents continued their consent by submitting reaffirmations of their consent to the adoption well after said adoption was final.

J.B. and W.J., natural parents and Appellees voluntarily invoked the jurisdiction of the Harrison County, Mississippi Courts.

In *Desjarleit v. Desjarleit*, 379 N.W.2d 139 (Minn. App. 1985), the father of the Indian children filed a petition for custody of his two children in a Minnesota County Court while both he and his wife and two children were all enrolled members of, and all residing on the Red Lake

Indian Reservation. After an unfavorable decision to him in lower Court he appealed to the Minnesota Appeals Court on the grounds that the State Court of Minnesota did not have jurisdiction to resolve child custody matters when the parties and their children are enrolled members of the Red Lake Indian Reservation residing on the reservation. The Court of Appeals affirmed the lower Court's decision and stated:

> "While the above principle (States have no authority to govern Indians within the boundaries of an Indian reservation) be well established, an aspect of this case makes application of the general rule inappropriate. Stuart (the father) *voluntarily* invoked the jurisdiction of the County Court when he filed his petition for dissolution."

The Minnesota Court of Appeals cited *In Re*: *Bertleson,* 617 P.2d 121, 125 (Mont. 1980) supporting their opinion that a State Court's jurisdiction can be voluntarily invoked by an Indian parent who filed a petition in this Court asking for a determination.

As in both *Bertleson* and *Desjarleit, supra,* the jurisdiction of the Chancery Court of Harrison County, Mississippi was voluntarily invoked by filing of adoption petition by the Indian mother of the children herein and in so doing left the adoption issue in the hands of the State Court to be decided accordingly. *In the Matter of S.Z., S.D.*, 325 N.W.2d 53 (S.D. 1982) the Supreme Court of South Dakota held that where the parents of an Indian child consented to the jurisdiction of a Circuit Court in South Dakota on neglect proceedings then jurisdiction remained with the State Court as opposed to the transfer of jurisdiction to the Tribal Court. This was done in

spite of the fact that the Indian children were enrolled members of the Rose Bird Sioux tribe and the parents later appeared to set aside their consent to the proceedings in the State Court. Appellees would further show *In the Matter of Duryea,* 115 Ariz. 86, 583 P.2d 885 (1977), the Supreme Court of Arizona cited *Wisconsin Potowatomies, Etc., supra,* and *Wakefield v. Littlelight, supra,* as not being applicable to the case before them where the Indian children "had been voluntarily and purposefully removed therefrom and placed with petitioners off the reservation. The conduct of the parents in leaving the children and abandoning them . . . took place completely off the reservation." In the instant case, the Mississippi Supreme Court stated that in its earlier decision, *Stubbs v. Stubbs,* 211 So.2d 821 (Miss. 1968) that domicile is determined by physical presence, declaration of intent, and other relevant facts and circumstances. In the case at bar, said Indian children never resided outside of Harrison County, Mississippi, were voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents, and is undisputed that the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi. Further, both parents executed consent and reaffirmation of their consent specifically stating that they wished for the matter to be heard in the Chancery Court of Harrison County, Mississippi and that the Holyfields be allowed to adopt said children.

III.

Whether or Not Mississippi Courts' Requirements of Physical Presence Within and Parental Consent to Children's Acquisition of Their Parents' Residence and Domicile Unlawfully Infringe Upon the Special Federal/Tribal Relationship When Applied to Indian Children of Reservation Parents.

Appellant weakly attempts to discredit the ruling of the Mississippi Supreme Court by creating the term "forked jurisprudence." In labeling the Mississippi Supreme Court's rationale in support of their ruling in the instant case, Appellant attempts to support its "forked jurisprudence" theory by pointing out a conflict in cases decided by the Mississippi Supreme Court. Appellant's theory deserves no more attention than it has already been given. It will suffice to say that the final arbitrator of the definition of domicile in the State of Mississippi is the Mississippi Supreme Court. In *Stubbs, supra,* the Mississippi Supreme Court gave its criteria for determining domicile and used this criteria and rationale in the case at bar.

Appellant heavily relies on the case of *Matter of Adoption of Halloway,* 732 P.2d 962 (Utah 1986). Appellees would show that *Halloway* supports more strongly the position of Appellees than it does the Appellant. In *Halloway,* the State Supreme Court of Utah stated,

> "the ICWA does not expressly define how domicile is to be established. The Bureau of Indian Affairs' guidelines for implementing the ICWA, however, states that definitions (of domicile) were not included (in the Act or the guidelines) because these terms are well defined under existing State law. There

is no indication that these State law definitions tend to undermine, in any way, the purposes of the ICWA." (Emphasis added)

44 Federal Register 67-583, 67-585 (1979) (not codified). The Mississippi Supreme Court applied its State definition of domicile in this case. The fact that the children never resided on the reservation is undisputed. How Appellant can argue that the definition of domicile must be decided on a Federal issue and not a State issue is beyond Appellees' comprehension as the ICWA itself does not define domicile. See *Halloway, supra*. Appellant is asking this Court to decide the issue of domicile based on a definition rendered by the Supreme Court of the State of Utah. In *Halloway, supra,* an Indian child was removed from the reservation by the mother and placed in the home of foster parents. (Emphasis added) Again, as Appellees have urged from the very initial beginnings of this case in the lower State Courts, none of the cases cited by Appellant apply to the facts of this case as 1) the Indian children in this case have never resided on the Choctaw reservation and 2) both natural parents consented to this proceeding in the State Court of Harrison County and expressly objected to the transfer of that case to the Tribal Court and consented to the adoption of the children by the Holyfields (JA 18, 19, 20, 21), and 3) at no stage of this proceeding has either of the natural parents objected to the adoption of these children by the Holyfields. Also, in *Halloway, supra,* Chief Justice Stuart concurring in the result states,

"Certainly State Courts must, and do have jurisdiction over adoption proceeding of Indian children in some cases . . . ."

In the dissenting opinion in the *Halloway* case Justice Howe states,

"Majority opinion concedes that the evidence supports the determination of the Trial Court that Cecelia (mother) tended to abandon her child . . . . Majority opinion states that the ICWA does not expressly define how domicile is established under the Act. It accepts the guidelines of the Bureau of Indian Affairs for implementing ICWA, which states the definitions of domicile were not included in the Act because these terms are well-defined under existing State law. There's no indication that these State law definitions tend to undermine, in any way, the purposes of the Act. However, contrary to the above statement, the majority then attempts to demonstrate how State definitions do undermine the Act, and concludes that Utah's common law of domicile is preempted by the ICWA. I cannot accept that reason. I believe that the Bureau of Indian Affairs guideline means exactly what it says and that the Trial Court properly applied Utah case law in domicile . . . . Much like students and others who come and go, the domicile of Indians must be determined on an individual case basis. It is frequently pointed out that Americans are a mobile nation. Our Indian people are no exception. Indian people are perhaps even more mobile because of the fact that it is increasingly difficult for them to make a living within the confines of the reservations."

Again, under 25 U.S.C., Section 1913, the adoption proceeding in the case at bar was a voluntary proceeding. Section 1913 permits application of State law and has

its own system of "checks and balances" for if one of the parents of the Indian child objects during any stage of the proceeding prior to the entry of the final decree, then the State Court must return custody of the Indian child to the parent objecting.

IV.

Whether or Not the Definition of Residence or Domicile of Indian Children for Purposes of the Indian Child Welfare Act Turns on a Federal Rather Than a State Definition.

There is no Federal definition of domicile. There is no definition of domicile provided for in the ICWA. Again, citing *Halloway, supra*, the Supreme Court of Utah specifically stated,

> "The ICWA does not expressly define how domicile is to be established. The Bureau of Indian Affairs' guidelines for implementing the ICWA, however, state that definitions (of domicile) were not included (in the act or the guidelines) because these terms are well-defined under existing State law. (Emphasis added) There is no indication that these State law definitions tend to undermine, in any way, the purposes of the act."

The Mississippi Supreme Court in the case at bar is the final arbitrator for the definition of domicile as it applied to the facts in this case. The U.S. Supreme Court has never overturned any known State law by a State Supreme Court. Appellees would humbly request that this great Court give full faith and credit to the decision of the Mississippi Courts and their definition of domicile in the case at bar.

Appellees will waste no time in distinguishing any of the cases cited in Appellant's Argument Number Four except to say that none of the cases cited have the same facts as this case. The facts in this case are unique; it is different from all other cases involving the adoption of Indian children in one of two ways: 1) On all cases found by Appellant and Appellees, there exist no cases wherein one or both of the natural parents failed to object to the termination of their parental rights at one stage of the proceeding, or 2) in all other cases the children at some point in their life physically resided on the reservation.

In the case at hand it should be brought to the Court's attention that under 25 U.S.C., Section 1912, in any involuntary proceeding in the State Court involving the termination of parental rights for foster care placement of an Indian child, the statute requires that not only shall the Court notify the parent or Indian custodian, but the Indian child's tribe by registered mail with return receipt requested of the pending proceedings and of their right of intervention in the State Court. However, under Section 1913, *supra*, which is a voluntary proceeding, there is no notice required to be given to the Indian tribe. This distinction in itself clearly shows that in a voluntary proceeding the State Courts are permitted to conduct voluntary termination of parental rights for adoptive placements of Indian children within notice to the tribe. Under Section 1913 (c) in the event that the parent of the Indian child should wish to withdraw their consent for any reason at any time prior to the entry of final decree, as the case may be, the child shall be returned to the parent. Also, Appellees would again point out to the Court's attention that under 25 U.S.C., Section 1911 (b)

which states in part "The State Court absent objection by either parent . . ." shall transfer the proceeding to the jurisdiction of the tribe. (Emphasis added) Upon review of the reaffirmation of consent and affidavit which were executed by the natural parents of the Indian children in this case one sees that both parents not only consented to the adoption and legally abandoned the children to the Holyfields, but specifically expressed their wish that the proceeding be held in the Chancery Court of Harrison County, Mississippi and not in the Tribal Court. (JA 18, 20) This not only gave the lower Court "good cause" but invoked the jurisdiction of the lower State Court and registered the parents' objection to this proceeding being held anywhere except in the Chancery Court of Harrison County, Mississippi.

CONCLUSION

Appellees submit that no Indian family was "broken up" as this was a voluntary proceeding when the children in this case were placed with the Holyfields for adoption by the natural parents. The natural mother and father of said children were not married, and in fact the father was married to another woman. In this case the evidence is clear that the parents went to great efforts to 1) place the children with the Holyfields for adoption and 2) invoke the jurisdiction of the Chancery Court of Harrison County, Mississippi for the voluntary proceeding. To deny these Indian parents their right to place their children for adoption with the Holyfields and to deny them access to the State Courts would be to deny them due process guaranteed to all by our State and Federal Constitutions regardless of race. The purpose of the

ICWA is a good one - one designed to prevent an abuse of not only the rights of Indian children but their parents as well. This case is certainly not a case of abuse as the adoption was arranged by the mother with full consent of both natural parents. The natural mother of said children related to this writer prior to the lower State Court proceeding that if her children were not adopted by the Holyfields that they would be placed with five to seven other children on the reservation in a foster home for the purpose of her tribe receiving additional Government subsidies. She further stated to this writer that she hoped her children would have an opportunity in life and would be loved and nurtured by parents who were able to care for them. The mother also knew that no roots would be disturbed because Mr. Orrey Holyfield's paternal grandmother was a full-blooded Choctaw Indian.

Respectfully submitted,

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December, 1988

APPENDIX TO APPELLEES' BRIEF

SUBCHAPTER I - CHILD CUSTODY PROCEEDINGS

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an

Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the

parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceedings.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

§ 1913. Parental rights, voluntary termination

(a) Consent; record, certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack: vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provision of this subsection unless otherwise permitted under State law.

§ 93-17-3. Who may be adopted-who may adopt-venue of adoption proceedings-change of name.

Any person may be adopted in accordance with the provisions of this chapter in term time or in vacation by an unmarried adult or by a married person whose spouse joins in the petition, provided that the petitioner or petitioners shall have resided in this state for ninety (90) days preceding the filing of the petition, unless the petitioner or petitioners, or one of them be related to the child within the third degree according to civil law, in which case such restriction shall not apply. Such adoption shall be by sworn petition filed in the chancery court of the county in which the adopting petitioner or petitioners reside or in which the child to be adopted resides or was born, or was found when it was abandoned or deserted, or in which the home is located to which the child shall have been surrendered by a person authorized to so do. The petition shall be accompanied by a doctor's certificate showing the physical and mental condition of the child to be adopted and a sworn statement of all property, of

any owned by the child. Should the doctor's certificate indicate any abnormal mental or physical condition or defect, such condition or defect shall not in the discretion of the chancellor bar the adoption of the child if the adopting parent or parents shall file an affidavit stating full and complete knowledge of such condition or defect and stating a desire to adopt the child, notwithstanding such condition or defect. The court shall have the power to change the name of the child as a part of the adoption proceedings. The word "child" herein shall be construed to refer to the person to be adopted, though an adult.

No. 87-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS,
Appellant,

v.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,
Appellees.

On Appeal From the Supreme Court of Mississippi

REPLY BRIEF OF THE APPELLANT

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December, 1988

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QUESTIONS PRESENTED

Do Mississippi Courts have jurisdiction over adoptions of Indian children whose natural parents are residents of and domiciled on an Indian Reservation?

A. Does a state court requirement of physical presence within and parental consent to children's aquisition of their parents' residence and domicile unlawfully infringe upon the special federal/tribal relationship reflected in the ICWA when applied to Indian children of reservation parents?

B. Does the definition of residence or domicile of Indian children for purposes of the Indian Child Welfare Act turn on a state or federal definition?

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SUPPLEMENTAL STATEMENT

Appellee Orrey Curtiss Holyfield died on September 15, 1988. A certificate of death is being lodged with the Clerk of the Court in documentation of this occurrence.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER 87-980 AS AN APPEAL.

Appellees seemingly confuse and mix their argument against 28 U.S.C. § 1257(2) appellate jurisdiction of this Court with their argument for state court jurisdiction over the adoptions themselves. They then skew the latter argument throughout the remainder of their brief. Nowhere do they contest 28 U.S.C. § 1257(3) review jurisdiction; seemingly acquiesing, as they should, that certiorari review in any event would lie on that basis.[1]

The gist of Appellees' argument is their claim that the issue of "the validity and the constitutionality of the Mississippi Adoption Act * * * to the adoption of twin Indian infants * * * would have had to have been raised in the lower State Court proceedings and it was not." Appellees Br. p. 6. That argument finds no support in the record of this case and fails in any

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[1] Argument I of Appellant's reply shall address only those issues of this Court's appellate jurisdiction. Those matters concerning claimed state court jurisdiction will be reserved for treatment later in this brief.

event to go to the core of this Court's appellate jurisdiction.[2]

The constitutional applicability of the Mississippi Adoption Act to this case is an ineluctable component of the tribe's challenge to the jurisdiction of state courts below. Even had it not been raised, it would nonetheless become a cognizable question for review under the "plain error" doctrine. Rule 34.1(a) provides: "At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." Certainly in light of this Court's explicit ruling scarcely a decade ago on that very question in *United States v. John*, 437 U.S. 634 (1978), "plain error" would here lie.

Additionally, this Court has held that once jurisdiction has attached, "consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the [lower court] is not beyond our power, and in appropriate circumstances we have addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980).

Appellant's Brief at page 16, fn. 12 does acknowledge unclarity about the precise direction and import of the Mississippi Supreme Court's holding, but this Court has previously exercised its power to determine that the federal question was necessarily decided by the state court [*Street v. New York*, 394 U.S. 576

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[2] The crux of the issue before this Court is subject matter jurisdiction of the State court below and jurisdiction is a question which may be raised at any stage of legal proceedings and may be raised by the Court *sua sponte*. *KVOS v. Associated Press*, 299 U.S. 269 (1936).

(1969)] or that the state court's refusal to deal with that question is a mere evasion of this Court's jurisdiction [See e.g., *Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904) and *Wolfe v. North Carolina* 364 U.S. 177 (1960)] or created unexpectedly by decision of the highest state court. [See e.g., *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930) and *Herndon v. Georgia*, 295 U.S. 441 (1935).]

Appellants resubmit that substantial federal questions have been properly framed, raised, presented and pursued in a timely and proper manner at all appropriate points in these proceedings. Appellants have fully met the requirements of Rules 21.1(h) and 15.1(g). This Court has jurisdiction over 87-980 as an appeal and, in any event, by certiorari.

II. MISSISSIPPI COURTS LACK JURISDICTION OVER ADOPTIONS OF INDIAN CHILDREN WHOSE NATURAL PARENTS ARE RESIDENTS OF AND DOMICILED ON AN INDIAN RESERVATION.

Appellees' argument that "25 U.S.C., Section 1913 gives State Courts jurisdiction in voluntary proceedings" (Appellees Br. pp. 6-7.) must fail because it mistakenly premises its application upon a claimed non-reservation residence and domicile status to these children of reservation natural parents. It must also fail because 25 U.S.C. § 1913(a) does not, as Appellees claim, give license for reservation resident and domiciled Indians to invoke *sua sponte* state court adoption jurisdiction in voluntary proceedings. Their claim cannot be squared with contravening sections of the

ICWA or with the governing prior decisions of this Court.[3]

Appellees' threshold concession that "[e]xclusive jurisdiction over the adoption and placement of Indian children is only conferred on the Tribal Courts under 25 U.S.C., Section 1911 which vests exclusive jurisdiction in the Indian tribe over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe" (Appellees Br. p. 6.) is proper. It follows that if the children are determined at law to be residents or domiciliaries of the reservation then Section 1911(a) would necessarily dictate the outcome. Having once made that concession, however, Appellees then argued inconsistently that state court jurisdiction could nonetheless be voluntarily invoked by an Indian parent under Section 1913(a). That is not the law.

25 U.S.C. § 1911(a) specifically excludes any State jurisdiction and makes the exclusion applicable to "*any* child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe * * * *" (Emphasis added.)

Congress having once made that enactment, Appellees cannot override federal law for their mere expedience by petitioning a state chancery court devoid of jurisdiction.

Neither 25 U.S.C. § 1913(a) nor Appellee's claimed authority of *Desjarleit v. Desjarleit*, 379 N.W.2d 139

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[3] Appellant's argument of this section shall address only the latter postulate; however the discussion of the residence and domicile issue under Argument III, infra, is incorporated by reference here as well.

(Minn. App. 1985); *In Re: Bertleson*, 617 P.2d 121, 125 (Mont. 1980); *In the Matter of S.Z., S.D.*, 325 N.W.2d 53 (S.D. 1982); or *In the Matter of Duryea*, 115 Ariz. 86, 583 P.2d 885 (1977) can serve to override the clear language and import of Section 1911(a).

Appellees seemingly misunderstand that *Desjarleit* and *Bertleson, supra.* are both custody cases following state divorce awards and that 25 U.S.C. § 1903(1) specifically exempts "an award, in a divorce proceeding, of custody to one of the parents" from ICWA coverage, jurisdiction and protection provisions.

Neither is *Matter of S.Z., S.D., supra*, of precedental value. Involved there were neglect proceedings for which Section 1911(b) expressly provides concurrent state jurisdiction subject to tribal court transfers. 1911(a) was never at issue in that case.

In the Matter of Duryea, supra, is of no authoritative value since it predates the passage of the ICWA and is now legislatively overturned. An unbroken string of post-ICWA Arizona cases now hold to the contrary of *Duryea. See*, e.g. *Matter of Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (Ariz. App. 1981); *Goclanney v. Desrochers*, 135 Ariz. 240, 660 P.2d 491 (Ariz. App. 1982); *Matter of Appeal in Maricopa County Juvenile Action No. A2*, 136 Ariz. 528, 667 P.2d 228 (Ariz. App. 1983); and *Matter of Appeal in Coconino County Juvenile Action No. J-10175*, 153 Ariz. 346, 736 P.2d 829 (Ariz. App. 1987).

Section 1913 could only be read in isolation to infer any basis for voluntary invocation of state adoption jurisdiction by reservation Indian parents and that

inference would be at clear odds with the stated purposes of the ICWA. This Court's precepts of statutory construction clearly preclude that approach. "[In] all cases of statutory construction, [the Court's] task is to interpret the words of the statute in light of the purposes Congress sought to serve." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, at 118. (1983). The United States Supreme Court, when engaged in the construction of a federal statute, cannot impute to Congress a purpose to paralyze with one hand what it sought to promote with the other. *United States v. Raddatz*, 447 U.S. 667 (1980).

Throughout their argument Appellees continue to ignore this Court's fundamental holding of exclusive tribal jurisdiction over reservation Indians' domestic relations in *Fisher v. District Court*, 424 U.S. 382 (1976). They also ignore this Court's observation therein that "even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U.S. 390-391. Mississippi courts lack adoption jurisdiction over Indian children of reservation resident and domiciled parents and Appellees' insistence upon invoking a non-extant jurisdiction despite contravening federal law and guiding decisions of this Court cannot be justified by Appellees' expediencies.

III. MISSISSIPPI COURTS' REQUIREMENTS OF PHYSICAL PRESENCE WITHIN AND PARENTAL CONSENT TO CHILDREN'S ACQUISITION OF THEIR PARENTS' RESIDENCE AND DOMICILE UNLAWFULLY INFRINGES UPON THE SPECIAL FEDERAL/TRIBAL RELATIONSHIP WHEN APPLIED TO INDIAN CHILDREN OF RESERVATION PARENTS.

Appellees' mischaracterization, and perhaps misunderstanding, of the true import of the case of *Matter of Adoption of Halloway*, 732 P.2d 962 (Utah 1986) should not be misleading to this Court. Neither should Appellees' unfounded assurances "that the final arbitrator [sic] of the definition of domicile in the State of Mississippi is the Mississippi Supreme Court." Appellees Br. p. 11. Rather, the true significance of the Utah Supreme Court's decision in *Halloway*, of course, is that it demonstrates a proper deference to preemptive federal law whenever the application of contravening state definitions would otherwise frustrate the purposes of federal statutes. Reinforcing Appellant's reliance upon the cases *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923) and *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1959) as authority for this proposition, is this Court's most recent ruling in *Felder v. Casey*, ___ U.S. ___, 101 L.Ed.2d 123 (1988). On a much closer question impacting heavily on legitimate state interests and principles of federalism, this Court nonetheless held that Wisconsin's notice-of-claim statute was pre-empted pursuant to the Supremacy Clause when § 1983 actions are brought in that state's courts. This Court instructed:

> Under the Supremacy Clause of the Federal Constitution, "[t]he relative importance to the State of its own law is not material when

> there is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield. *Free v. Bland*, 369 U.S. 663, 666 (1962). 101 L.Ed.2d at 138.

Both the majority and the dissenting opinion in *Felder* noted that there were important purposes underlying the notice-of-claim statute. The basis of departure between the majority and the dissent in *Felder* was the importance of pre-emption on balance with competing principles of federalism.

There are, however, no similar considerations in this instant case. Mississippi's affixing of physical presence and parental intent requirements to children's acquisition *at law* of their natural parents' residence and domicile at the time of birth can only be deemed a situation specific result oriented requirement. It is virtually impossible to conjure legal situations other than adoption actions where these particular elements would otherwise transect. Furthermore, it appears that the only operative effect Mississippi's dual requirements could ever have would be to defeat this federal ICWA. Since the Indian Child Welfare Act is unique in its being the only federal law that delimits a mother's right on the basis of residency or domicile to voluntarily invoke a state court's adoption jurisdiction, application of these additional standards discriminatorily impacts only Indian tribes, Indian parents and Indian children.

Appellees would also leave the impression in their argument of this section that in *Stubbs v. Stubbs*, 211 So.2d 821 (Miss. 1968) "the Mississippi Supreme Court

gave its criteria and rationale in the case at bar." [Appellees Br. p. 11.] Their characterization cannot be squared with a full reading of that case, for the Mississippi Supreme Court opinion begins its legal analysis in the following manner:

> Quite clearly the domicile established by the mother and father of the decedent in Natchez, Mississippi, in 1955 became the domicile of the minor child. *Boyle v. Griffin*, 84 Miss. 41, 36 So. 141 (1904). This domicile of origin continues until another is acquired. *Lucia v. Lucia*, 200 Miss. 520, 27 So.2d 774 (1946), and *Smith v. Deere*, 195 Miss. 502, 16 So.2d 33 (1943).
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> 211 So.2d at 824.

This again illustrates that the decision on domicile by the court below was an avulsive break with the past approach of the Mississippi Supreme Court and a distinct deparation from generally accepted principles of domicile. This approach must not be allowed to defeat Federal intent in enacting the Indian Child Welfare Act.

IV. THE DEFINITION OF RESIDENCE OR DOMICILE OF INDIAN CHILDREN FOR PURPOSES OF THE INDIAN CHILD WELFARE ACT TURNS ON A FEDERAL RATHER THAN A STATE DEFINITION.

Appellees Argument of this section seems to build initially upon the flawed premise that "[t]here is no Federal definition of domicile" (Appellee's Br. p. 14) and none in the ICWA; therefore, their argument goes, Bureau of Indian Affairs' guidelines for implementing the Act borrowed existing state law defini-

tions. Appellees then erroneously argue that for this Court to overturn such a state definition would be unprecedented. Distinguishing this case on its claimed unique configuration of facts from the authorities (and seemingly the arguments) cited in Appellant's Argument Number Four, Appellees renew their belief that Section 1913 enables this state court adoption and does so without notice to the tribe.[4]

The ICWA authorizes the Secretary of Interior to promulgate "such rules and regulations as may be necessary to carry out the provisions" of the Act. 25 U.S.C. § 1952. Acting through the BIA, the Secretary has promulgated numerous mandatory rules and regulations. In addition to these mandatory rules and regulations, Interior has also published recommended procedures or guidelines (hereinafter "guidelines") for state courts involved in Indian child custody proceedings. These "guidelines" are not binding and simply represent what the BIA believed at the time of enacting them was required to assure that the rights guaranteed in the ICWA were protected whenever state courts decided custody matters.[5]

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[4] Appellee, in response, continues to maintain that claims of factual distinctions or claims as to the uniqueness of these particular case facts cannot defeat the law of the case. The Section 1913 argument and the contention against this Court's overturning "any known State law by a State Supreme Court" (Appellee's Br. p. 14) being addressed elsewhere in this Brief, the remainder of this argument shall address the BIA implementation guidelines and the Federal definition of domicile issues.

[5] The United States' position on the ICWA is on record with this Court by virtue of its filing at the invitation of this Court as Amicus Curiae in *Pino v. District Court of the Second Judicial District's Children's Court, etc.*, No. 84-240. A copy of that filing has been lodged in this case with the Clerk of the Court.

This Court has held in *Morton v. Ruiz*, 415 U.S. 199 (1974) that Bureau of Indian Affairs regulations of its internal manual could not narrow or defeat entitlements otherwise provided by statute. It follows, *a fortiorari*, that a mere guideline, lacking even the purpose or force of a duly APA promulgated regulation, must give way in the face of the overriding ICWA's policy and provisions.

Another flaw to Appellees' guideline argument is that it overlooks the state of residency and domicile rules—including those espoused by Mississippi's courts—extant at the time of the guidelines' November, 1979 promulgation. Therefore, when the BIA Introductory comments to the guidelines determined unnecessary the inclusion of definitions of domicile because "these terms are well-defined under existing State law" and said "[t]here is no indication that these State law definitions tend to undermine, in any way, the purposes of the act" (Guidelines, 44 Fed.Reg. at 67,5 ___ (November 26, 1979) there was no conflict. To now extend that pronouncement to bind the Bureau's endorsement to all subsequent changings of state residency and domicile rules would be unconscionable.

At the time the guidelines were promulgated, American jurisdictions uniformly followed the rule that an illegitimate child takes the domicile of its mother. Restatement (Second) of Conflict of Laws §§ 14, 22 comment c (1971); Restatement of Conflict of Laws § 34 (1934).

Mississippi, itself, had scarcely three years before in *In Re Guardianship of Watson*, 317 So.2d 30 (Miss. 1975) explicitly stated: "The law is unchallenged that the residence of a minor is that of his parents and

remains so during the period of minority in spite of the temporary absence at school or elsewhere." Id, at 32.

Appellee cannot now bootstrap state court jurisdiction *ipso facto* by these rulings in this present case below.

Appellant disagrees, too, with Appellees' claim that "[t]here is no Federal definition of domicile." Appellees' Br. p. 14. Appellees seemingly misunderstand that federal enactments utilizing terms without expressly defining the words used need neither refer nor defer to state courts for final definition. Appellees seemingly disregard the fact that federal courts make routine threshold determinations of 28 U.S.C. § 1332 diversity jurisdiction by federal standards and definitions of domicile which at times are at variance with state standards

Appellants resubmit that their arguments and authorities of Part IV of their initial Brief on the Merits manifestly evince a congressional intent that the definition of residence or domicile of Indian Children for purposes of the Indian Child Welfare Act turn on a federal rather than a state definition.

Application of this Court's rules of statutory construction to this case also leads inescapably to the conclusion that a federal definition of residence and domicile was intended by Congress. The meaning of federal statutory language is normally "a question of federal, not state law." *Dickerson v. New Banner Institute, Inc., supra.* "In the absence of a plain indication to the contrary, * * * it is to be assumed when congress enacts a statute it does not intend to make its application dependent on state law." *Id.* at 119.

Quoting *NLRB V. Randolph Electric Membership Corp.* 343 F2d 60, 62-63 (CA4 1965).[6] This is because the application of federal legislation is nationwide and at times the federal purpose would be defeated if state law were to control. *Dickerson, supra.* at 119-120. Citing *Jerome v. United States*, 318 U.S. 101, 104 (1943).

In determining the scope of a federal statute, one is to look first at its language. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983). If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is a clearly expressed legislative intent to the contrary. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Any doubts or ambiguities, should they exist, are to be resolved in favor of the Indians. *Bryan v. Itasca County*, 426 U.S. 373, 392-393 (1976). *United States v. Kagama*, 118 U.S. 375, 384 (1886).

Appellants position constitutes the best practicable means for enforcing and carrying out the full provisions of the ICWA and the most reasonable means for judicial administration. By contrast, Appellees would foist a standard difficult to ascertain within ostensible *ex parte* adoptions of, too often, culturally reticent Indian parents' children. Balkanizations would be effected upon multi-state reservations and the standard of "intent" would control the destiny of infant children themselves incapable of entertaining, or

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[6] 25 U.S.C. § 1903(6)—the definitions portion of the act—does make specific reference to "state law" in defining Indian custodians. Circumstances considered, it would follow consistently that if Congress had in fact intended to define domicile according to state law it would have likewise so provided in Section 1903.

at least articulating intent if the ruling below were upheld.

In the alternative, if this Court accepts the theory that state law definitions of domicile are applicable, the Court must carve out an exception where state law definitions lead to a result which conflicts with federal legislative intent. Under either theory, the court below must be reversed.

CONCLUSION

Throughout, Appellant has refrained from responding to the repeated representations of claimed fact on matters that are not supported by the record—including the insertions of hearsay testimonials on the part of opposing counsel—and notwithstanding that much seemingly constitutes "burdensome, irrelevant, immaterial, and *scandalous* matter." Rule 34.6. (Emphasis added.) In addition, their factual distinctions are legally meaningless.[7] Appellant's silence in the face of these representations should not be construed as any acquiesence in the claimed truth of these matters but instead it constitutes deference to the rule of law.

It is on the basis of that law that this decision should be reversed and the case remanded with instructions to dismiss for lack of jurisdiction and to transfer the matter to tribal court.

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[7] The claim of one-quarter Choctaw lineage on the part of Orrey Curtiss Holyfield, even if established, would not have altered the situation. The 1975 Revised Constitution and By-Laws of the Mississippi Band of Choctaw Indians requires one-half or more Choctaw blood for membership. [Copy of the tribal constitution is lodged with the Court.]

Respectfully submitted,

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December, 1988

(6)

No. 87-980

In The

Supreme Court of the United States

October Term, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.

MISSISSIPPI BAND OF CHOCTAW INDIANS,

Appellant,

vs.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,

Appellees.

On Appeal From The Supreme Court of Mississippi

NAVAJO NATION'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF NAVAJO NATION, AMICUS CURIAE, IN SUPPORT OF APPELLANT

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NAVAJO NATION'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Navajo Nation moves this Court for leave to file this brief as Amicus Curiae in support of the Appellant, Mississippi Band of Choctaw Indians.

The Navajo Nation is a federally recognized tribe whose continuing relationship with the federal government was first formalized by the treaty signed on June 1, 1868 by General William T. Sherman for the United

States, and twenty-nine chiefs and headmen of the Navajo Nation. 15 Stat. 667.

There are questions of fact and law which have not been presented, nor are they likely to be adequately presented by the parties, but are relevant to the disposition of the case. The case presents issues the resolution of which is likely to have general application to all Indian tribes. The following are questions of particular concern to the Navajo Nation:

(1) Must state law be applied to determine domicile of an Indian child for purposes of Section 1911(a) of the ICWA if its application results in defeating the federal purposes of the Act? The Navajo Nation extends into three states. Many Navajos travel to or live for a time in these neighboring states and other states. Application of state law can result in many different results for Navajo cases arising under Section 1911(a).

(2) Is tribal law applicable under the Act in the foster or adoptive placement of Indian children outside of the reservation under state law? Appellant raised the issue of the applicability of section 1915(a) of the Act, involving the placement priorities for adoptions. However the Mississippi Supreme Court ignored the issue. Like many tribes, the Navajo Nation has its own laws, including custom, which identify the persons who have priority for custody and care of a child, when a parent cannot or will not keep a child. The ICWA at section 1915(c) requires the state court to follow the tribe's law for placement with consideration for the child's special needs. Parental preference is only entitled to

consideration. Section 1915(d) of the Act requires application of the social and cultural standards of the tribal community.

(3) Do parents who are tribal members have the right to defeat the tribe's exclusive jurisdiction over children by placing them outside the reservation under state law? The Navajo Nation makes children within its jurisdiction dependent if they are placed for care or adoption in violation of Navajo law, the ICWA or other federal law.

Respectfully submitted,

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July 28, 1988

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Appellees.

On Appeal From The Supreme Court of Mississippi

AMICUS BRIEF OF THE NAVAJO NATION

The Navajo Nation files this amicus brief because the instant case involves a matter of great impact upon Indian tribes of the United States of America: the diminishment of their inherent power over internal domestic affairs.

NAVAJO NATION'S INTEREST AS AMICUS CURIAE

The Navajo Nation is a federally recognized Indian tribe, having received services from the federal government since the Treaty of 1868. 15 Stat. 667. The Navajo government has been described as "the most elaborate" among tribal governments. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201, 85 L.Ed.2d 200, 105 S.Ct. 1900 (1985).

All Indian tribes recognize how important their children are. Upon adopting a new Children's Code, Title 9, Chapter 11 of the Navajo Tribal Code [hereafter "N.T.C."] in 1985, the Navajo Tribal Council stated:

> [C]hildren of the Navajo Nation are its most important resource . . . ; . . . special, unique and traditional relationships within the Navajo nuclear family, the Navajo extended family and the Navajo clan system . . . provide strength to the Navajo child, and . . . must be protected and reinforced; . . . .

Navajo Tribal Council Res. CF-14-85 (Feb. 8, 1985).

Although not unique among the tribes in their attitudes toward their children, families and culture, the Navajo Nation has been very active in litigating cases under the Indian Child Welfare Act, 25 U.S.C. sections 1901-1963 [hereinafter the "ICWA" or "Act"]. Not all of the cases are as high profile as *Matter of Adoption of Halloway*, 732 P.2d 962 (Utah 1986) or *Matter of Adoption of Baby Girl Keetso*, No. A-9214 (Cal. Super. Ct. 1988). However, since *Halloway*, most of the Navajo cases under section 1911(a) have been transferred to the tribal courts almost as a matter of course. The *Baby Keetso* case was such an example; after argument the California court

agreed that the Navajo Nation had exclusive jurisdiction over the adoption proceeding because of the domicile of the Navajo mother.

The Mississippi Supreme Court's decision below undercuts the purposes of the Act and directly conflicts with established federal law respecting the inherent powers of tribal governments over their members and internal affairs.

SUMMARY OF ARGUMENT

I. Subject to federal power, the core of Indian sovereignty is the exclusive power of governance in the tribe over matters within the tribal territory and concerning the tribal members.

II. Establishment of a federal rule for the definition of domicile under section 1911(a) would prevent the balkanization of the ICWA.

III. Tribes and Indian parents have protected interests in their children. Individual tribal members cannot defeat a tribe's interest in its children.

ARGUMENT

I. Indian Sovereignty

Inherent Indian sovereignty necessarily includes the exclusive power to govern internal relations of tribal members. Indian tribal sovereignty is "the authority of Indian governments over their reservations" which the

Supreme Court has guarded consistently. *Williams v. Lee*, 358 U.S. 217, 223, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959). "State jurisdiction [. . .] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223. Examples of a tribe's inherent powers include: regulation of membership, domestic relations among tribal members, and inheritance. *United States v. Wheeler*, 435 U.S. 313, 322, n.18, 55 L.Ed.2d 303, 98 S.Ct. 1079 (1978).

The principle of exclusive jurisdiction of tribes over matters of domestic relations involving tribal members clearly confers on the Mississippi Choctaw Band the sole power to determine custody of B.B. and G.B.

II. Federal Law and the Application of Section 1911(a)

The federal power over Indian affairs is exclusively in the United States Congress and derives from the Indian Commerce Clause. U.S. Const., Art. 1, § 8, cl.3. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 170, n.6, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973). The Constitution gives any federal law with regard to Indians supremacy over any conflicting state law. U.S. Const. Art. VI, cl. 2.

Section 1911(a) of the federal Indian Child Welfare Act states, in part, that a tribe has jurisdiction exclusive as to any state over child custody proceedings involving Indian children who reside or are domiciled within the reservation of the tribe.

The Mississippi Supreme Court's decision in this case is contrary to section 1911(a), which legislatively confirmed pre-existing federal law recognizing and enforcing exclusive tribal jurisdiction when the Indian child resided

or was domiciled on the reservation. H.R. REP. No. 1386, 95th Cong., 2d Sess. 21 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 6530, 7540-41 [hereinafter "House Report"]. The House Report specifically cited *Wisconsin Band of Potowatomies v. Houston*, 393 F. Supp. 719 (D.W.D. Mich. 1973), as an example of the desired intent of the ICWA to support the tribes' exclusive jurisdiction.

In *Wisconsin Potowatomies*, the state probate court had assumed jurisdiction over the children because they were off the reservation at the time of their parents' death. The Potowatomie tribe had never given up its internal powers over its members. The court observed that, although a paternal Indian uncle had sought custody in the state court, the actions of an individual Indian "cannot create subject matter jurisdiction of Indian affairs in a state court". 393 F.Supp. at 733. Stating that if tribal sovereignty is to mean anything, it must include the right to provide for the care of its children within its boundaries, *Id.* at 730. The court held that the domicile of the children at the time the state court took jurisdiction was the dispositive issue. *Id.* at 732. Following the general rule, the court found that the children's domicile followed that of their parents on the reservation, and the domicile remained on the reservation although the parents died. *Id.* at 731-732.

In the instant case, the Mississippi Supreme Court interpreted its own case law when it concluded that the Choctaw children were domiciled at the place of their voluntary surrender by their mother. Although the state courts are the final authorities on the construction and interpretation of state law, *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975), the purposes

and meaning of a federal law are not dependent on state law, unless Congress expressly so provides. *Jerome v. United States*, 318 U.S. 101, 104, 87 L.Ed. 640, 63 S.Ct. 483 (1943); *Popkin v. N.Y. St. Health & Mental Hygiene, etc.*, 547 F.2d 18 (2d Cir. 1976). State law cannot control the extent of a federal right so as to defeat the purposes of the federal act. *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 361, 96 L.Ed. 398, 72 S.Ct. 312 (1951) "[O]nly if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Id.* "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply". *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 170-171, 36 L.Ed.2d 129, 93 S.Ct. 1257. *See*, also, *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 48 L.Ed.2d 96, 96 S.Ct. 1634 (1976); *Bryan v. Itasca*, 426 U.S. 373, 48 L.Ed.2d 710, 96 S.Ct. 2102 (1976).

In a case decided after *Wisconsin Potowatomies*, but prior to enactment of the ICWA, this Court upheld the exclusive jurisdiction of the Northern Cheyenne Tribe over an adoption proceeding involving children and petitioners who were all tribal members. *Fisher v. District Court*, 424 U.S. 382, 47 L.Ed.2d 106, 96 S.Ct. 943 (1976). Whether state or tribal courts have jurisdiction over a dispute between Indians and non-Indians arising out of conduct on a reservation, in the absence of a governing federal law, depends on whether the state action infringed on the Indians' right of self-government on their reservations. 424 U.S. at 386. The Court specifically noted that to allow state jurisdiction over the adoption

would cause a substantial risk of conflicting adjudications on custody of Cheyenne children *and* a corresponding decline in the tribal court's authority. *Id.*, at 388. The Court stated that adoption proceedings are properly characterized as litigation arising on the reservation and "the jurisdiction of the Tribal Court is exclusive". *Id.*, at 389.

The ICWA is the governing federal law which requires the state courts to adhere to federal standards in child custody proceedings involving Indian children.

Domicile for purposes of the ICWA should not be construed under state laws, but rather under federal law, which includes relevant treaties, statutes and cases. Federal law recognizes tribal laws. *Williams v. Lee*, 358 U.S. 217. Interpretation of domicile based on federal and tribal law would accomplish the express intent of Congress to enforce tribes' exclusive powers in child custody proceedings involving reservation-domiciled children and would make it unnecessary for tribes to bear the heavy burden of litigation in the many, and often hostile, state forums.

The Mississippi Court held that, although the parents were reservation-domiciliaries, the children acquired domicile other than that of their Choctaw parents because they were born outside the reservation and the mother surrendered the children to Appellees outside the reservation. As a result, the court erroneously concluded that the ICWA did not apply. The court effectively denied the Choctaw Tribe of the right and the opportunity to assert its significant interests in adjudicating this case in the Choctaw court and, on behalf of the subject children, in enforcing the placement preferences of the ICWA.

Many tribes have their own laws regarding family and children. For example, the Mississippi Choctaw Band has its constitution and By-Laws (1975), and governmental legislation which cover their internal affairs. By this lawsuit the Mississippi Choctaw Band is enforcing its law, which is that they have exclusive jurisdiction over cases like this. Similarly, the Navajo Nation has several code sections dealing with family issues and children. Title 9 of the Navajo Tribal Code covers marriage, husband and wife, divorce, adoptions, guardians and children. The most recent revision to Title 9 is the Children's Code, amended 1985. In addition to the Code, Navajo case law covers many issues involving children.[1]

Although the state courts have jurisdiction under the Act over child custody proceedings involving Indian children domiciled outside the reservation, those courts must apply the ICWA to such proceedings. For reservation-domiciled children, however, section 1911(a) requires the application of federal and tribal law in order to give full effect to the purposes of the ICWA. Allowing the state courts to use state law to defeat the clear intent of section 1911(a) will result in inconsistent application of the Act throughout the United States. State invasion of this area of law would diminish the sovereignty of Indian tribes in direct contravention of established federal law. See, *U.S.*

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[1] Child support, custody, adoption, inheritance, jurisdiction, domicile, to name a few. *See, Navajo Reporter,* volumes 1-4 and compiled decisions from 1985 to the present, available through the Navajo Nation Bar Association, Post Office Drawer R, Window Rock, Arizona 86515.

v. Quiver, 241 U.S. 602, 35 S.Ct. 699, 60 L.Ed. 1196 (1916); *Fisher,* 424 U.S. 382, *Montana v. Blackfeet,* 471 U.S. 759; 85 L.Ed.2d 752, 105 S.Ct. 2399 (1985).

In the instant case, the Mississippi Supreme Court distorted the meaning of *Boyle v. Griffin,* 84 Miss. 41, 36 So. 141 (Miss. 1904), by ignoring the underlying rule of that case which is the same as the rule argued by the Choctaw Band: the domicile of children is that of their parents.

The history and impact of the ICWA are more fully discussed in the amicus briefs filed by the Native American Rights Fund and the Association of American Indian Tribes, Inc., on behalf of several tribes. It bears repeating here that the Act explicitly extends the right of a Tribe to participate in state court proceedings involving children of the Tribe. This is especially so when a case comes under section 1911(a). Limiting a tribe's right to intervene only in foster care or termination of parental rights proceedings is too narrow a reading of the Act, given the Congressional findings and statement of policy at 25 U.S.C. sections 1901 and 1902, respectively, and the legislative history.

Several courts have recognized a tribe's independent interest in its children, including one of the cases cited by the Mississippi Supreme Court, *Re J.R.S.,* 690 P.2d 10 (Alaska 1984). See, also, *Matter of Appeal in Maricopa County Juvenile Action No. A-25525,* 136 Ariz. 528, 667 P.2d 228 (1984). *Re J.R.S.* involved circumstances different from the instant case, except that the Alaska Supreme court explicitly recognized that a tribe has its own inter-

est in its children.[2] The court held that the tribe's right to intervene is covered by Rule 24 of the Alaska Rules of Civil Procedure on intervention as of right. Citing *Matter of Appeal in Maricopa County Juvenile Action No. A-25525*, 136 Ariz. 528, the court noted the tribe's central role in custody proceedings involving Indian children, and described the extensive influence that section 1915 of the Act gives to tribes in foster care placements, adoptions, and review of state records of state agency placements of Indian children. *J.R.S.*, 690 P.2d at 18.

The Alaska court should have noted, but did not, that section 1915(c) of the Act would allow a tribe to establish a different order of preference which the state courts would have to follow. The court also should have noted that section 1915(d) requires the state courts to apply the social and cultural standards of the Indian community where the parent or extended family resides or with which they maintain social and cultural ties in making the placements under section 1915. The court stated:

> [W]e conclude that the Village's interest is substantial and the alternatives to requiring intervention unacceptable. If Indian tribes are to protect the values Congress recognized when it enacted the Indian Child Welfare Act, tribes must be allowed to participate in hearings at which those values are significantly implicated.

690 P.2d at 15.

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[2] The Alaska Court incorrectly concluded that there is no tribal right of intervention under the ICWA in voluntary adoptions although acknowledging the extensive involvement of the tribes in all child custody proceedings under the Act.

While *J.R.S.* is a decision using state law to support the Indian tribe's rights under the Act, Alaska is only one among many forums which tribes must confront, with differing results.

Under the ruling of the Mississippi court, the Choctaw Tribe would never again have any jurisdiction over its children because all Mississippi Choctaw children are born in hospitals outside their reservation.

The impact upon all tribes is that the states will be able to use state law to divest tribes of inherent sovereignty in violation of Congress' express Act, if the decision below is not reversed by this Court.

III. Indian Parents and Tribes

The decision of the Mississippi court emphasized the parents' written consents and actions in turning over the child, implying that this somehow supported the state's exercise of jurisdiction and nullified the Act's application to the case. The implication is that the parents had a paramount right to use state power to place their children with the Holyfields and the tribe could not defeat that right.

It has been said that the family is not beyond the power of regulation in the public interest. *Prince v. Massachusetts*, 321 U.S. 158, 88 L.Ed. 645, 64 S.Ct. 438 (1943); reh. den. 321 U.S. 804, 88 L.Ed. 1090, 64 S.Ct. 784. The range of the government's power is wide when a child's welfare is affected. 321 U.S. at 167.

Adoption is one example of the areas in which government's power is taken for granted. Adoption was unknown at common law; it is a matter of statute. *Anguis*

v. Superior Court, 6 Ariz. App. 68, 429 P.2d 702 (1967). The states have adoption statutes, as do tribes such as the Mississippi Choctaw and the Navajo.

Congress enacted the ICWA based upon its Constitutional plenary power over Indian affairs. The Act had the effect of reaffirming exclusive tribal jurisdiction and divesting the purported power of the states when the adoption proceedings involve an Indian child, as defined in section 1903(4). The sections of the Act which directly affect adoptions are 1901-1903, 1911, 1913-1917. Under the Act the Indian parent's interests in the child sometimes conflict with that of the Tribe, *e.g.*, dependency proceedings, termination proceedings, transfer proceedings under section 1911(b), and voluntary adoptive placements of children by the Indian parents.

The concept of tribal power with regard to children is analogous to state power in relation to children within state jurisdiction. However, there are aspects of tribal membership and relations which make tribes quite different from states. See, *e.g.*, section 1901(5), referring to the essential tribal relations of Indian people and their different cultural and social standards. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 L.Ed.2d 106, 98 S.Ct. 1670 (1978), included an extensive discussion of the tribes as distinct political communities. 436 U.S. at 55. In construing Title I of the Indian Civil Rights Act, 25 U.S.C. sections 1301-1303, [hereafter the "ICRA"] this Court noted that the ICRA modified the Bill of Rights under the U.S. Constitution "to fit the unique political, cultural, and economic needs of tribal governments". 436 U.S. at 62.

Similar to the way that tribes' interests and those of their members were provided for under the ICRA, Congress adopted the ICWA to protect both individuals and tribes. The ramifications of the Act, particularly section 1911(a), do not render the Act invalid under any theory of law, with regard to Indian parents' interests. Section 1911(a) merely confirms a rule of law already in force on most reservations. See, *e.g.*, 9 N.T.C. section 1055(d), providing for exclusive jurisdiction similar to section 1911(a) of the ICWA.

The ICWA protects the tribe's interest in its children and the children's right to be Indian. The Act recognizes that the tribal interest is distinct but on a parity with the interest of the parents. *Halloway*, 732 P.2d at 969.

Because this case is covered by section 1911(a), the issue of the parents' preference for placement is subject to the exclusive jurisdiction of the Tribe. *Williams v. Lee*, 358 U.S. 217, *Fisher*, 424 U.S. 382. The adoption proceeding can, accordingly, be heard in the Choctaw courts, where the parents and other interested parties will have ample opportunity to be heard.

Alternatively, even if section 1911(a) were not applicable to this case, the parents' preference for the Holyfields as adoptive parents only would be entitled to consideration where appropriate. 25 U.S.C. section 1915(c). The appropriateness of their preference could be evaluated only in light of the placement preferences of section 1915(a). Section 1915(a) must be complied with unless there is good cause. The Arizona Court of Appeals emphasized that the ties of an Indian child to the tribe are important, and the preferences for placement can only be

circumvented for good cause. *Matter of Appeal in Maricopa County*, 136 Ariz. 528, 667 P.2d 228 (Ariz. App. 1983). Because of the relationship of tribes and their children, the ICWA designates the tribal court as the exclusive forum for custody and adoption of reservation-domiciled children, and the preferred forum for other Indian children. *Halloway*, 732 P.2d at 970. In the instant case the entire Act was simply ignored and the parental preferences were given much greater weight than the ICWA permits.

Under the facts of this case, enforcement of section 1911(a) does not result in any violation of a parental right, when all that will happen is that the adoption will be heard in the correct forum under Choctaw law. There is no authority holding that a parent has the right to avoid the tribal court and confer subject matter jurisdiction on the state court. *Wisconsin Potowatomies*, 393 F.Supp. 719.

The Choctaw Tribe has jurisdiction over adoptions of its children. Revised Constitution and By-laws of the Mississippi Band of Choctaw Indians, Article III, § 11-7-5 (1975). The actions of an individual tribal member domiciled on a reservation cannot confer subject matter jurisdiction upon the state court, and defeat the tribe's interest in the children. 393 F.Supp. at 733.

CONCLUSION

For the reasons stated in this brief, the Navajo Nation requests that this Court reverse the decision of the Mississippi Supreme Court and remand the matter for immediate transfer of the case to the Choctaw tribal court for further proceedings.

Respectfully submitted,

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Appellees.

On Appeal From The Supreme Court of Mississippi

Motion For Leave to File Brief of Amici And Brief Of Amici Curiae Swinomish Tribal Community, Shoshone-Bannock Tribes, and Turtle Mountain Band of Chippewa Indians in Support of Appellant

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Appellees.

On Appeal From the
Supreme Court of Mississippi

Motion For Leave To File Brief Amici Curiae

The Shoshone-Bannock Tribe, Swinomish Tribal Community, and Turtle Mountain Band of Chippewa Indians hereby respectfully move for leave to file the attached brief *amici curiae,* supporting reversal of the decision of the Mississippi Supreme Court of the decision in this case.

The written consent of counsel for appellees has been requested. No reply having been received, amici hereby file this motion for leave to file brief *amici curiae* pursuant to Rule 36.3 of the rules of the court. If written consent of counsel for appellees is subsequently obtained, such consent shall be filed with the court.

The interest of amici in this case are as follows:

1. Indian Tribes have an independent but equal interest in their children to that of the parents of such Indian children. The Tribe, as *parens patriae,* has an interest in insuring that its children grow up with a viable connection to the tribe.

2. The jurisdictional interest of the Mississippi Band of Choctaw Indians may be different than the jurisdictional interests asserted by amici tribes. The Choctaw Reservation was not created through a treaty with the United States and the modern existence of the Mississippi Band of Choctaw Indians is not the same as the continual governmental authority exercised by amici tribes since time immemorial.

3. Mississippi Band of Choctaw Indians has an interest in asserting continuation of the jurisdictional principles enunciated in *United States v. John,* 437 U.S. 634 (1978), which may be different than the interest of amici tribes under the Indian Child Welfare Act.

4. Amici Indian tribes are all involved in ongoing Indian Child Welfare Act proceedings in state court, and resolution of the instant case before the United States Supreme Court will have a significant impact on the ability of amici tribes to advocate their interests under the Indian Child Welfare Act in ongoing proceedings.

5. Affirmation of the decision of the Mississippi Supreme Court decision divesting Indian tribes of exclusive jurisdiction over children who are domiciled on an Indian reservation under tribal law, in favor a decision vesting state courts with jurisdiction over Indian children under the principle that such children are domiciled in the state under state law, will have a substantial adverse affect on the ability of amici tribes to maintain their viability as governmental entities recognized and protected by the United States Constitution.

6. The position of the Mississippi Band of Choctaw Indians with regard to how it views consents to adoption executed by adult members of the tribe may be different than the views of amici tribes on this issue.

7. Amici Indian tribes plan to address principles of preemption in Indian law, interpretation of federal statutes affecting Indian tribes, interpretation of the term "domicile" in federal statutes, and questions of tribal law and custom as they affect interpretation of the Indian Child Welfare Act in a manner different than those questions will be addressed by appellant Mississippi Band of Choctaw Indians.

For the foregoing reasons the Shoshone-Bannock Tribe, Swinomish Tribal Community, and Turtle Mountain Band of Chippewa Indians hereby seek leave of the court to file the attached *Amici Curiae* brief.

Dated this 28th day of July, 1988.

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Appellees.

On Appeal From the Supreme Court of Mississippi

Brief of Amici Curiae

INTEREST OF AMICI CURIAE

Amici curiae have a substantial interest in this case. They are federally recognized Indian tribes with governing bodies and court systems.

The issues raised in this case deal with jurisdiction of tribal courts in adoption cases involving children eligible for tribal membership. The jurisdiction and membership of amici will be affected by the decision in this case.

———o———

SUMMARY OF ARGUMENT

The Indian Child Welfare Act of 1978 (ICWA) is rationally related to the fulfillment Congress' unique obligation toward the Indians and the preservation and protection of tribal self government.

The exclusive jurisdiction section of the ICWA confirms long standing Supreme Court precedent protecting tribal authority over the internal affairs of its members and preempting state jurisdiction in areas of critical interest to the tribe. Undefined terms in federal statutes are to be defined according to federal common law, consistent with the underlying purposes of the statute. The canons of construction applicable to Indian affairs are relevant to interpretation of the ICWA. Legislative history to the ICWA indicates congressional intent to defer to tribal decisions regarding custody of Indian children. Individual adult Indians domiciled on an Indian reservation may not waive the exclusive jurisdiction of the tribe. Questions involving tribal jurisdiction should be determined first by the tribal court. Existing case law under the ICWA is consistent with a federal common law definition of domicile fulfilling the intent of the Act. Tribal definitions of legal custody and of the responsibility of

the extended family in child rearing are entitled to deference by the court's and can best be applied in tribal court proceedings.

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ARGUMENT

THE INDIAN CHILD WELFARE ACT IS A RATIONAL EXERCISE OF CONGRESSIONAL AUTHORITY OVER INDIAN AFFAIRS.

This case presents the first opportunity for the Court to review the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901 *et seq.* The ICWA is a rational exercise of congressional authority over Indian affairs. *E.g., Application of Angus,* 655 P.2d 208 (Or. App. 1982), *rev. denied,* 660 P.2d 683 (1983), *cert. denied sub nom, Woodruff v. Angus,* 464 U.S. 830; *Matter of Guardianship of D.L.L. & G.L.L.,* 291 N.W.2d 278 (S.D. 1980).

The standard for review of federal statutes affecting Indians is set out in *Morton v. Mancari,* 471 U.S. 535 (1974):

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

471 U.S. at 555. In enacting the ICWA, Congress recognized that its trust obligation to Indian people encompasses a relationship between the protection of Indian

children and the preservation of tribal self-government: "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). *See Matter of J.R.S.*, 690 P.2d 10, 18-19 (Alaska 1984). Congress based this finding upon a realization that "child-rearing is an 'essential tribal relation'" and concluded that there can be "no greater infringement on the right of the • • • tribe to govern themselves than to interfere with tribal control over the custody of their children. . . ." H.R. REP. NO. 1386, 95th Cong. 2d Sess. 14-15 (1978), *reprinted at* 1978 U.S. CODE, CONG. & ADMIN. NEWS 7530, 7537 ("House Report") (*quoting Wakefield v. Little Light*, 347 A.2d 228 (Md. App. 1975)).

One court has ruled that Congress established an express trust relationship between the federal government and Indian tribes for the protection of Indian children in enacting the ICWA. *Navajo Nation v. Hodel*, 645 F.Supp. 825, 827-28 (D. Ariz. 1986).

THE ICWA CONFIRMS TRIBAL AUTHORITY OVER THE INTERNAL AFFAIRS OF ITS MEMBERS.

The question before the Court in this appeal is not whether the non-Indian adoptive parents are fit to raise the Indian children; it is whether the Choctaw tribal court retains jurisdiction to apply its tribal laws, customs and policies in determining the permanent custody of two Indian children born to two Indian parents domiciled on the Choctaw reservation.

The Court in an unbroken line of cases has upheld the sovereign authority of Indian tribes to regulate their internal affairs and social relations free from state interference. *E.g. Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). As stated in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983):

> The sovereignty retained by tribes includes "the power of regulating their internal and social relations," [citations]. A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that "absent governing Acts of Congress," a State may not act in a manner that "infringed on the right of reservation Indians to make their own laws and be ruled by them." [citations].

462 U.S. at 332-33. Tribal sovereignty includes authority over adoptions of tribal members, *Fisher v. District Court*, 424 U.S. 382 (1976); domestic relations, *United States v. Quiver*, 241 U.S. 602, 604 (1916), and the membership status of tribal children. *Santa Clara v. Martinez*, 436 U.S. 49, 55-56 (1978).

The ICWA did not *grant* jurisdiction to Indian tribes over matters involving tribal children; it merely confirmed the Supreme Court precedents discussed immediately above, and also confirmed developing case law involving custody of Indian children which equated the "domicile" of an Indian child with the "arising on the Indian reservation" standard required to preempt the exercise of state authority. *Fisher v. District Court, supra*, 424 U.S. at 389; House Report, *supra*, at 21, 1978 U.S.C.C.A. at 7544 (citing *Wakefield v. Little Light, supra; Wisconsin Band of Potowatomies v. Houston*, 393

F.Supp. 719 (D.W.D. Mich. 1973); *In re Greybull,* 543 P.2d 1079 (Or. App. 1975); *In re Buehl,* 555 P.2d 1334 (Wash. 1976).

The present case is similar factually to the controversy before the Court in *Fisher v. District Court, supra.* Permitting the Choctaw mother to temporarily leave the reservation, consent to the adoption of her new children and thereby defeat tribal jurisdiction creates the same "substantial risk of conflicting adjudications affecting the custody of the child," and would cause the same "decline in the authority of the Tribal Court" that were present in *Fisher. Id.,* 424 U.S. at 388. As the Court concluded in that case, upholding the exclusive jurisdiction of the Tribal Court over custody matters involving Indian children benefits the class of which the Choctaw parents are members "by furthering the congressional policy of Indian self-government. [citation]." 424 U.S. at 390-91.

It would certainly be anomalous if federal policy implemented in legislation designed to improve the health status of Indians, *See, e.g.,* Indian Health Care Improvement Act, 25 U.S.C. § 1601, *et seq.,* which led to the provision of health facilities for the Mississippi Choctaws, also led to the loss of tribal jurisdiction of Choctaw children merely because the facilities for delivery of Choctaw babies happened to be off-reservation and the natural mother in this case had to leave the Choctaw reservation to give birth. *See* Appellant's Jurisdictional Statement, p. 4, n. 2.

THE UNDEFINED ICWA TERM "DOMICILE" MUST BE INTERPRETED CONSISTENTLY WITH THE PURPOSES OF THE ICWA AND IN ACCORDANCE WITH INDIAN CANONS OF CONSTRUCTION.

The ICWA states in relevant part: "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe. . . ." 25 U.S.C. § 1911(a). The term domicile in this section is not defined in the ICWA. Legislative history to this section states that it confirms developing case law addressing the issue of domicile for Indian children, and decisions cited by Congress on this point are authority for how the term should be interpreted as used in the ICWA. House Report, *supra,* at 21, 1978 U.S.C.C.A.N. at 7544 (citing *Wisconsin Band of Potowatomies v. Houston; Wakefield v. Little Light; In re Greybull;* and *In re Buehl, supra.*

Well-settled rules of statutory construction hold that in the absence of a plain indication to the contrary, it is assumed when Congress enacts a statute it does not intend to make its application dependent on state law, *Dickerson v. New Banner Institute,* 460 U.S. 103, 119 (1983) (citing *NLRB v. Natural Gas Utility Dist.,* 402 U.S. 600, 603 (1971), and that the Court's task "is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Dickerson,* 460 U.S. at 118 (citing *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 608 (1979)). Undefined terms in federal statutes are controlled by federal common law consistent with the intent of the underlying statute, in the absence of an express in-

dication to the contrary. *E.g., Kantor v. Wellesley Galleries*, 704 F.2d 1088, 1090 (9th Cir. 1983); *Stifel v. Hopkins*, 477 F.2d 1116, 1120 (6th Cir. 1973); *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968).

It is clear that the ICWA does not refer to state law for interpretation of terms in the Act. Congressional findings specifically refer to the misapplication of state law and state judicial authority as one of the primary reasons leading to enactment of the remedial language contained in the ICWA. 25 U.S.C. § 1901(5). ICWA legislative history concludes that Congress "does feel the need to establish minimum *federal standards and procedural safeguards* in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe." House Report, *supra*, at 19, 1978 U.S.C.C.A.N. at 7541 (emphasis added).

The intent of the ICWA was to confirm and strengthen tribal jurisdiction over Indian children by "deferring to tribal judgment on matters concerning the custody of tribal children." Part III, Department of the Interior, Bureau of Indian Affairs; Guidelines for State Courts: Indian Child Custody Proceedings, § A. Policy, 44 Fed. Reg. 67584, 67585 (Nov. 26, 1979) ("BIA Guidelines"). The ICWA not only confirmed existing tribal jurisdiction in 25 U.S.C. § 1911(a), it divested state courts of their valid, preexisting jurisdiction over off-reservation Indian children by requiring state courts to transfer state child custody proceedings involving Indian children to tribal court at the request of the tribe. 25 U.S.C. § 1911(b). To give states authority to interfere with the exercise of tribal jurisdiction through the application of state domicile

law would be an unwarranted intrusion on tribal sovereignty, and is preempted. *See New Mexico v. Mescalero Apache Tribe*, *supra*, 462 U.S. at 331-336.

Canons of construction developed by the Court to interpret and implement federal statutes affecting Indians support an interpretation of domicile under ICWA which protects and enhances tribal jurisdiction over Indian children. Two of the canons apply in this case. First, statutes passed for the benefit of Indian tribes must be liberally construed in favor of the Indians. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Second, any ambiguous expressions in statutes affecting Indians must be resolved in favor of the Indians. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973). The ICWA must be liberally construed in favor of a result consistent with the Act's policies of deferring to tribal judgment on Indian child custody matters and keeping Indian children within their culture. BIA Guidelines, *supra*, § A, 44 Fed. Reg. at 67585. The Mississippi Supreme Court's ruling under state law, which resulted in divestment of the Choctaw tribal court's jurisdiction, cannot be reconciled with the purposes of the ICWA, and application of state law to interpret domicile under the Act must be preempted.

The only reference to state law and domicile under the ICWA appears in BIA Guidelines interpreting the Act. These Guidelines were published over a year after the ICWA was enacted. BIA Guidelines, *supra*. Several people commenting on the proposed guidelines recommended that definitions of domicile and residence for section 1911(a) be adopted to avoid any misinterpretation of these terms by state courts. The Bureau refused, stating:

"definitions were not included [in the guidelines] because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine, in any way, the purposes of the Act." BIA Guidelines, *supra*, 44 Fed. Reg. at 67585.

There is no indication in this statement that Congress evidenced any intent to define domicile according to state law. *Cf. State ex rel. Juv. Dept. v. England*, 640 P.2d 608 (Ore. 1982) (specific reference to "state law" in definition of Indian custodian, 25 U.S.C. § 1903(6)). It does indicate that the BIA recognized that any definition of domicile which conflicted with the intent of the ICWA would be preempted.

Agency interpretations must be consistent with congressional purpose to be accorded deference. *Morton v. Ruiz*, 415 U.S. 199, 237 (1974). Also, "standard principles of statutory construction do not have their unusual force in cases involving Indian law." *Montana v. Blackfeet Indians*, 471 U.S. 759, 766 (1985). The BIA's application of state law in defining domicile under the ICWA is not entitled to deference by the Court under both of these holdings.

Federal courts have interpreted the term "domicile" as it relates to minors in the context of the federal diversity statute, 28 U.S.C. § 1332. *E.g., Ziady v. Curley, supra*, 396 F.2d at 874-75 ("citizenship" equals domicile). The *Ziady* court interpreted domicile in a manner consistent with the purposes of the diversity statute. *Id.*

THE QUESTION OF JURISDICTION SHOULD BE DETERMINED IN THE FIRST INSTANCE BY THE TRIBAL COURT.

The natural parents of the children at issue in this case were at all relevant times domiciled on the Choctaw Indian Reservation. Appellant's Jurisdictional Statement, p. 3. The general rule is that at birth, an illegitimate child takes the domicile of the mother as his domicile of origin. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971), § 22, comment c. *See* also § 14. Arguably, the domicile of the children was with their mother on the Choctaw Reservation at birth, and the Choctaw tribal court had exclusive jurisdiction over the children under 25 U.S.C. § 1911(a). Not until the Mississippi courts issued rulings shifting the children's domicile off-reservation was there a question on this issue.

The Court has recently ruled in two cases involving competing federal and tribal court claims of jurisdiction that federal policy toward Indians requires tribal courts to be given the first opportunity to determine the question of jurisdiction. In *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985), the Court confirmed federal question jurisdiction to determine whether a tribal court has exceeded its jurisdiction. Despite this ruling, the Court concluded that the federal court should stay its proceeding to give the tribal court the first opportunity to determine its jurisdiction. 471 U.S. at 855-57. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. —, 94 L.Ed.2d 10 (1987).

These two cases involved situations where tribal and federal courts both had jurisdiction, *National Farmers*,

or such jurisdiction was arguable. *LaPlante.* While the claim in the present case is that the Choctaw tribal court has *exclusive* jurisdiction, the rule of deference to tribal determinations of jurisdiction enunciated in *National Farmers* and *LaPlante* is also appropriate here.

This conclusion stems from the Court's ruling that determinations of tribal jurisdiction by *non-tribal* courts would interfere with the federal policy of protecting tribal self-government:

> [T]he federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the Tribal Court a "full opportunity to determine its own jurisdiction." . . . [A]ccess to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. . . . Adjudications of such matters *by any non tribal* court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.

LaPlante, supra, 480 U.S. at —, 94 L.Ed.2d at 20 (emphasis added). Similar principles underlie enactment of the ICWA. *See* 25 U.S.C. § 1901.

Courts generally have jurisdiction to determine their own jurisdiction. *See, e.g., United States v. United Mine Workers of America,* 330 U.S. 258 (1947). In the present case, however, the exercise of this rule of judicial authority served to undermine the authority of the Choctaw Tribal Court over its children, and to deprive the tribe of jurisdiction over custody decisions involving its children. Where the state court's exercise of such a rule "interferes or is incompatible with federal and tribal interests reflected in tribal law," *New Mexico v. Mecalero*

Apache Tribe, supra, 462 U.S. at 334, such exercise of state authority must yield to full implementation of the federal statute. *See Montana v. Blackfeet Tribe of Indians, supra,* 471 U.S. 759, 766 (1985).

OTHER CASE LAW ADDRESSING THE MEANING OF DOMICILE UNDER THE ICWA SUPPORTS EXCLUSIVE JURISDICTION IN THE TRIBAL COURT.

Several state courts have addressed the issue of exclusive tribal jurisdiction under the ICWA and the meaning of domicile in 25 U.S.C. § 1911(a). Until the decision of the Mississippi Supreme Court in the pending case, all of the courts to address the issue have confirmed the exclusive jurisdiction of the tribal court in factual situations where an Indian parent domiciled on a reservation has executed a consent to adoption of her child while outside the reservation. *Matter of Adoption of Halloway,* 732 P.2d 962 (Utah 1986); *Matter of Adoption of Baby Child,* 700 P.2d 198 (N.M. App. 1985); *In re Pima County Juvenile Action No. S-903,* 635 P.2d 187 (Ariz. App. 1981), *cert. denied sub nom, Catholic Social Services of Tucson v. P.C.,* 455 U.S. 1007 (1982).

The *Baby Child* case involved facts almost identical (except for the involvement of the father) to the case presently before the Court. The New Mexico Court of Appeals in *Baby Child,* however, concluded that the Indian child assumed its mother's on-reservation domicile at birth, giving the tribal court exclusive jurisdiction to decide the child's custody. 700 P.2d at 200-201. This holding is contrary to the decision of the Mississippi Supreme Court in the present case. The New Mexico Court of Appeals' ruling in *Baby Child* resulted in the dismissal

of a proceeding before the Court involving the domicile of the same child and the jurisdiction of the tribal court as decided in a separate state court proceeding. *See Pinto v. District Court*, No. 84-248, *appeal dismissed*, 472 U.S. 1001 (1985).

None of these three state cases directly addressed the issue of how the term domicile should be interpreted under the ICWA. All three applied state definitions of domicile without discussion, although the Utah Supreme Court in *Halloway* based its application of state domicile law on the reference to state law discussed earlier and contained in the BIA Guidelines, *supra*, 44 Fed. Reg. at 67585. *See* pp. 12-13, *supra*.

The *Halloway* decision contains an extensive discussion on the preemption of state law under the ICWA when application of state law would undermine the purposes of the statute and deprive Indian tribes of jurisdiction over their children. 732 P.2d at 965-970. The Utah Supreme Court's discussion parallels in many respects the discussion which appears in this amicus brief, and amici tribes urge the Court to adopt the analysis set out in *Halloway*. While amici tribes disagree with the Utah Supreme Court's conclusion that Congress left questions of domicile to be decided under state law in the ICWA, 732 P.2d at 967, the court reached the proper result when it held that "state law must bow when the application of that law brings the state and federal policies into conflict. [citation]." *Id.* A simpler result could have been reached if the court had merely adopted a *federal* definition of domicile consistent with the purposes of the ICWA.

AN INDIVIDUAL ADULT INDIAN DOMICILED ON AN INDIAN RESERVATION MAY NOT WAIVE THE JURISDICTION OF THE TRIBAL COURT.

The Mississippi Supreme Court ruled that the actions of the parents in this case were taken to deprive the tribe of jurisdiction over the children at issue. *Matter of B.B.*, 511 So.2d 918, 921 (Miss. 1987). This conclusion is contrary to well-settled case law of this Court holding that an adult Indian domiciled on an Indian reservation cannot waive the exclusive jurisdiction of the tribal court. *Fisher v. District Court, supra*, 424 U.S. at 390-391.

Two decisions incorporated by Congress in legislative history to the ICWA as support for the exclusive jurisdiction section of the Act follow the Court's reasoning in *Fisher*. *Wisconsin Band of Potowatomies v. Houston, supra*, 393 F.Supp. at 733; *Wakefield v. Little Light, supra*, 347 A.2d at 239. *See House Report, supra*, at 21, 1978 U.S.C.C.A.N. at 7544. These decisions evidence congressional intent to prohibit parental waiver of exclusive tribal jurisdiction while the parents are domiciled on a reservation. One court has affirmed this conclusion under the ICWA. *Matter of J.M.*, 718 P.2d 150 (Alaska 1986).

QUESTIONS INVOLVING TRIBAL CUSTOMS SHOULD BE DECIDED IN TRIBAL COURT.

The ICWA contains express congressional recognition of the "essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). In many

respects these "relations" and "standards" differ from those of the majority culture. *See, e.g.,* House Report, *supra,* at 10, 1978 U.S.C.C.A.N. at 7532 ("dynamics of Indian extended families"); *In re J.J.S.,* No. WR-CV-21-83 (Nav. D. Window Rock, Nov. 4, 1983), *reprinted at* 11 Indian Law Reporter 6031, attached as Appendix A (Navajo common law of adoption), *Cf. Moore v. East Cleveland,* 432 U.S. 494 (1977) (constitutional recognition of extended family).

This Court held in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), that issues involving tribal members which "arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts." 436 U.S. at 71. Interference with tribal jurisdiction over such matters would "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." *Id.* at 72. The same principles are expressed through enactment of the ICWA in regards to state court involvement. Tribal jurisdiction over child custody decisions involving Indian children must be protected if tribal self-government is to be perpetuated.

CONCLUSION

For the foregoing reasons, the decision of the Mississippi Supreme Court in *Matter of B.B.,* 511 So.2d 918 (Miss. 1987), must be reversed and the exclusive jurisdiction of the Choctaw Tribal Court over the children in this case should be affirmed.

Respectfully submitted,

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APPENDIX A

(Reprinted from 11 Indian Law Reporter 6031)

NAVAJO DISTRICT COURT FOR
THE DISTRICT OF WINDOW ROCK

IN RE: J.J.S.

No. WR-CV-21-83 (Nav.D.Window Rock, Nov. 4, 1983)

Summary

Based upon Navajo common law regarding family and clan obligations, the Window Rock District Court grants adoption in this case to members of the child's extended family.

Full Text

Before TSO, District Judge

Statement of the Case

This is a case involving a minor child who is seriously neglected by his mother. The father of the child is unknown. As a result of the mother's severe neglect of the child her parental rights have been terminated pursuant to law. Upon termination of parental rights the natural mother expressed her desire that her child be adopted by Mr. Dan and Mrs. Helen Chee.

A petition for adoption is also pending before this court on the above-named minor child filed by Mr. Johnny and Mrs. Patricia Stephens. Mr. and Mrs. Stephens are not members of the Navajo Tribe.

The social workers submitted an excellent investigation report and recommendation. They have determined that both families are fit to raise the minor child. Mrs. Chee is a cousin to the child's natural mother and therefore a member of the extended family of the natural moth-

er and resides in Pine Dale, New Mexico within the jurisdiction of the Navajo Nation.

The court is confronted with the issue as to who should be appointed adoptive parents of this minor child since the two couples petitioning to adopt the child are both fit.

Applicable Law

The first thing this court must do is find which law applies in this case.

The trial court of the Navajo Nation has original jurisdiction over all cases involving the domestic relations of Indians, such as divorces, or adoption matters. 9 N.T.C. Section 1001 *et seq.*

The Navajo Tribal Code gives the court a choice of law to use in a given case.

7 N.T.C. Section 204, Law Applicable in Civil Actions, a. In all civil cases the Courts of the Navajo Tribe shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or custom of the Tribe not prohibited by such federal laws.

The law is very clear if there is an applicable custom of the tribe not prohibited by federal laws then the court can apply those customs including any ordinances of the Navajo Tribe.

Navajo Common Law Defined

This court in its decision in the case of the *Estate of Apache,* WR-CV-197-82, [see 11 Indian L. Rep. 6005]

(Window Rock Dist. Ct. 1983), pronounced its preference for the term "Navajo common law" rather than "custom" for the reason that it is not widely understood that the customs and tradition of the Navajo people are law, and English term is used because it more accurately reflects our custom as law. The word "custom" for the purpose of the statute not only includes customs which may be testified to, noticed, proved, by expert testimony or otherwise shown by evidence, but it includes recorded opinions and decisions of the Navajo courts (not dealing with statutory interpretation or the application of principles of state or general Anglo-European law), and some learned treatises on Navajo ways, *id.*

American Law on Adoption

There are laws of the United States which this court can use in ruling on this case including the Indian Child Welfare Act (1978). This court can apply those federal laws in absence of a Navajo custom which is not prohibited by federal law. Fortunately, there is a Navajo custom that this court is aware of and can apply in deciding the issue in this case.

Adoption is a legal process by which the law makes a substitution of parents for a child and terminates the parent and child bond with the natural parents, at least legally speaking. The adoption process requires the termination of the legal bond with the natural parents because of the idea that there can only be one parent and child relationship at any one time. Clark, *The Law of Domestic relations in United States,* Section 18.1, p. 602 (1968).

An important point about Anglo-European adoption law is that it is a law which is created only by statute,

and it did not come to the United States courts through the English common or customary law. *Id.* at 603. As rseult, the current American law of adoption is recent and a product of modern American attitudes. There has also been a history of hostility towards the law of adoption in American courts, possibly due to the fact that it was not created over a long period of time by the courts to fit the needs of those who have come before them. *Id.*

Navajo Common Law on Adoption

The American law of adoption thinks in terms of duties. Natural parents have duties towards their children, and when those duties are breached, then the law will take the children away from the natural parents and give them to other parents. Navajo concepts are different and the following description has been made of Navajo legal attitudes towards family relationship.

> Navajos believe that each person has a right to speak for oneself and to act as one pleases. The mutual rights and duties of kinsmen normally discussed under the concept of the jural relations are best described as mutual expectations, rather than obligations. This distinction is a matter of emphasis and decreeing, but it is very real and worth noting. Desirable actions on the part of others are hoped for and even expected, but they are not required or demanded. Coercion is always deplored.

Witherspoon, *Navajo Kinship and Marriage,* pp. 94-95 (1975).

Therefore, the Navajo view of the relationship of children to parents is not one of a simple parent and child relationship, but an entire pattern of expectation and desirable action surrounding children. *Opinion of Court Solicitor,* 83-10 (1983).

A central concept of child rearing in Navajo society should be grasped before there is any discussion of the Navajo common law of adoption. One description of that concept is:

> The Navajo people identify themselves as "Dine," which means the people. The term is simply an expression of native pride or a message that conveys many things which are central in native feelings. One of the most important societal values included in this natural native feeling is the attitude towards children, they are highly valued and wanted. The basis for the Navajo life ethics was that the original parents of the first human infant pronounced a death penalty on any creator or being who mistreated the first child. This act or behavior would devalue or humiliate the supernaturals with whom the first human baby was identified. Therefore, in the Navajo religious context inhumane cruelty to children was prohibited.

Navajo Child Rearing Concept, Child Abuse and Neglect—A Navajo Perspective, Navajo Children's Legal Services, Draft Section of a Manual for Use in Child Welfare Services (1983).

The Navajo common law principle is one of the expectation that children are to be taken care of and that obligation is not simply one of the child's parents. The Navajo have very strong family ties and clan ties.

The term adoption is used by Navajo commentators on Navajo common law but is used in a different sense than that used in Anglo-European adoption statutes:

> Orphans of Navajo families or children of large families or broken homes are adopted by other family members or a family member of the same clan of the child.

Carl N. Gorman, *The Navajo Nation Is Made Up Of Many Clans*, Address to the Navajo Nation Children's Conference (1980) (published in *Dine Center for Human Development For Generations To Come* (1982).

Many Navajo adoptions have a different focus than Anglo-European law. As such, it is not principally concerned with the exchange of legal parents.

> Navajo adoption is based on need, mutual love and help. Children may or may not change the surname. Either way the family is a unit with strong, supportive, extended family and clan ties. It has worked for hundreds of years without adoption agencies and courts of law.

Id.

Another distinctive aspect of Navajo adoption is that it is not necessarily permanent.

> Adoption is merely a case of taking the children into the home for a limited time, or permanently, by extended family or parental agreement, depending on the circumstances. The child is raised and treated as one's own. Grandparents are sometimes the ones to take in and raise the young children belonging by birth to their own deceased or unwed children or other related family members.

Id.

> In Navajo Common Law a child is said to be born for his father's clan and a member of his mother's clan. This means that the child is an integral part

> of a functioning self-reinforcing and protecting group. Anglo-Europeon law is primarily concerned with immediate parent and child relationship while Navajo Law is concerned with the relationship of a child to a group which shares the expectation that its members will take care of each other's children.

Court Solicitor's Opinion, 83-10 (1983).

The correct statement of the Navajo common law of of adoption is that there is an obligation in family members, usually aunts or grandparents or a family member, who are best suited to assist the child to support and assist children in need by taking care of them for such periods of time as are necessary under the circumstances, or permanently in the case of a permanent tragedy affecting the parents. The Navajo common law is not concerned with the termination of parental rights or creating a legalistic parent and child relationship because those concepts are irrelevant in a system which has obligation to children that extends beyond the parents. Therefore, upon the inability of the parents to assist a child or following the occurrence of a family tragedy, children are adopted by family members for care which may be temporary or permanent, depending upon the circumstances. The mechanism is informal and practical and based upon community expectation founded in religious and cultural belief. *Opinion of the Solicitor to the Courts of the Navajo Nations*, No. 83-10, September 9, 1983.

Navajo Statutes on Adoption

The Navajo Tribal Council is presumed to have had the common law as discussed above in mind when it enacted the following statutes recited in the opinion and order of this court, ***In the Matter of the Estate of Boyd***

Apache, Cause No. WR-CV-197-83, October 11, 1983 (Citation omitted.):

1. 9 NTC Section 1256, states that after terminating the rights of parents, the court may place the child for adoption *under applicable laws and regulations.* (Emphasis added.)

2. 9 NTC Section 1192, states: "In placing the child under the guardianship or legal custody of an individual or of a private agency or institution, the court shall give primary consideration to the welfare of the child but, whenever practical, may take into consideration the religious preferences of the child and of his parent."

3. 9 NTC Section 1001 states that family ties should be preserved and strengthened whenever possible.

4. 9 NTC Section 1197 states that the court may make any other reasonable orders which are for the best interests of the child or are required for the protection of the public.

5. 9 NTC Section 615 expresses the policy of the Navajo Tribe in regards to the adoption of Navajo children, to wit:

(a) The Navajo Tribal Council favors the formal adoption of Navajo children in accordance with the provision of this chapter in all cases where the parents of such children are dead, or where such chilren are regularly and continuously neglected by their parents, or where the parents have abandoned such children. The Tribal Council looks with disfavor upon informal arrangements for the custody of such children except for temporary periods pending their formal adoptions.

(b) In the case referred to in subsection (a) of this section the Navajo Tribe neither favors nor disfavors adoption of Navajo children by parents who are not members of the Navajo Tribe but states as its policy

that each case shall be considered individually or on its own merits by the Tribal Court of the Navajo Tribe. Mr. and Mrs. Dan and Helen Chee.

Conclusion

In conclusion, the court rules that extended family member of the child and the natural mother has stepped forth and recognized and assumed her responsibility and obligation to care for a child who is severely neglected by the natural mother. The Social Services report as well as testimonies at trial also reveal that the home is a fit and appropriate place for the child to be raised and that it is in accordance with the Navajo common law and therefore it should grant adoption to that member of the extended family. A findings of fact and an order to this effect will follow forthwith, which is incorporated into this opinion by reference.

(8)

No. 87-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS, *Appellant*,

v.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER, AND W.J., NATURAL FATHER, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., KALISPEL TRIBE OF INDIANS OF THE KALISPEL RESERVATION, WASHINGTON, THE MESCALERO APACHE TRIBE OF THE MESCALERO APACHE RESERVATION, NEW MEXICO, PUEBLO OF SAN ILDEFONSO OF NEW MEXICO, PUEBLO OF SANTA ANA OF NEW MEXICO, PUEBLO OF SANTO DOMINGO OF NEW MEXICO, PUEBLO OF TESUQUE OF NEW MEXICO, SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA OF THE MESQUAKIE SETTLEMENT, IOWA, AND SISSETON-WAHPETON SIOUX TRIBE OF THE LAKE TRAVERSE INDIAN RESERVATION, NORTH DAKOTA AND SOUTH DAKOTA FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT

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July 1988

**Attorney of Record*

IN THE
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Pursuant to Rules 36(3) and 42(3), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 95 Madison Avenue, New York, New York 10016, the Kalispel Tribe of Indians of the Kalispel Reservation, Washington, the Mescalero Apache Tribe of the Mescalero Apache Reservation, New Mexico, the Pueblo of San Ildefonso of New Mexico, the Pueblo of Santa Ana of New Mexico, the Pueblo of Santo Domingo of New Mexico, the Pueblo of Tesuque of New Mexico, the Sac and Fox Tribe of the Mississippi in Iowa of the Mesquakie Settlement, Iowa, and the Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Indian Reservation, North Dakota and South Dakota respectfully move the Court for leave to file the attached brief amici curiae in support of the appellant. The appellees refused consent to the filing of this brief.

The Association on American Indian Affairs, Inc. (AAIA) is a non-profit membership corporation organized under the laws of the State of New York for the purpose, inter alia, of protecting the rights of self-government exercised by Indian tribes. For many years, the Association has been the largest Indian-interest organization with a nationwide membership that consists of both Indians and non-Indians. The Association began its active involvement in Indian child welfare issues in 1967 and for many years was the only national organization active in confronting the crisis in Indian child welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of the Indian Child Welfare Act and, at the invitation of Congress, AAIA was closely involved in the drafting of the Act. The Association continues to work with tribes in

implementing the Act including the negotiation of tribal-state agreements, testimony before Congress and legal assistance in contested cases.

The other amici are federally recognized Indian tribes, each exercising jurisdiction over child custody proceedings involving tribal members who are resident or domiciled within their respective tribal communities.

Amici seek to file an amici curiae brief in this case because of the far-reaching impact the decision below is likely to have on the ability of Indian tribes to exercise exclusive jurisdiction over custody determinations involving children with respect to whom Indian tribes have a substantial parens patriae and societal interest. Amici also seek to file an amici curiae brief because the decision below seriously jeopardizes the best interests of Indian children,

interests that Indian tribes are most competent to protect.

The immediate parties to this suit have focused primarily upon the circumstances surrounding their particular dispute and are, of course, less concerned with the broader framework of the dispute and its potential consequences for every tribe. To apprise the Court of this impact and to place the dispute in proper context, including a full examination of the purposes of the Indian Child Welfare Act (ICWA) and the social circumstances and legal precedents that gave rise to the ICWA, the amici respectfully request that their motion for leave to file the attached brief amici curiae be granted.

Respectfully submitted,

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* Attorney of Record

July 25, 1988

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INTEREST OF AMICI CURIAE

The Association on American Indian Affairs, Inc. (AAIA) is a non-profit membership corporation organized under the laws of the State of New York for the purpose, inter alia, of protecting the rights of self-government exercised by Indian tribes. For many years, the Association has been the largest Indian-interest organization with a nationwide membership that consists of both Indians and non-Indians. The Association began its active involvement in Indian child welfare issues in 1967 and for many years was the only national organization active in confronting the crisis in Indain child welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of the Indian Child Welfare Act and, at the invitation of Congress, AAIA was closely involved in the

drafting of the Act. The Association continues to work with tribes in implementing the Act including the negotiation of tribal-state agreements, testimony before Congress and legal assistance in contested cases. The Association has filed amicus curiae briefs with this Court in major cases affecting Indian rights, including United States v. Dion, 476 U.S. 734 (1986), County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226 (1985), and National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

The other amici are all federally recognized Indian tribes. These amici, in their parens patriae capacity, exercise jurisdiction over child custody proceedings involving tribal members and have a substantial and compelling governmental and societal interest in

maintaining a meaningful relationship, whenever possible, with children who are tribal members or eligible for membership. Unfortunately, amici have learned from bitter experience that state jurisdiction over custody proceedings involving Indian children most frequently severs all connection between such children and their tribes, thereby placing tribal survival at grave risk, and, because these children are often placed in non-Indian homes little concerned with their Indian identity, these children are often crippled by devastating psychological dysfunction.

This case presents a question of great and continuing concern to the amici: whether Indian tribes have the exclusive authority to determine -- based upon a thorough and culturally-sensitive analysis of the children's best interest -- the custody and, in particular, the adoption

of Indian children whose parents reside and are domiciled on the reservation of the Indian child's tribe.

The importance of this question to longstanding principles of Indian self-determination cannot be overemphasized. If the Mississippi Supreme Court decision is allowed to stand, many Indian children will continue to be placed in inappropriate settings that will deprive them of a tribal relationship. Many of these children will be irreparably and adversely affected while the tribes will lose the opportunity to impart tribal culture, language, customs and beliefs to their next generation -- upon which the very existence of all tribes depends.

Amici submit the attached brief in support of the appellant to assist the Court in recognizing that the decision of the court below badly misconstrues the purpose and meaning of the Indian Child

Welfare Act and contravenes numerous decisions of this and other courts protecting tribal exclusive jurisdiction over domestic relations matters, including child custody. If uncorrected, the decision could have a devastating impact on tribal self-government and survival. The immediate parties to the case are likely not to consider the broader ramifications of the decision below nor to fully brief the historical, sociological and legal context which gave rise to the enactment of the Indian Child Welfare Act. Such a discussion by amici may be helpful to the Court in considering this case.

STATEMENT OF THE CASE

For purposes of this brief, amici curiae adopt the "Statement of the Case" found in Appellant's jurisdictional statement at pages 3-5.

SUMMARY OF ARGUMENT

Throughout the history of the United States, this Court and other courts have recognized the inherent sovereign power of Indian tribes over domestic relations matters involving tribal members who maintained tribal relations. In particular, the right of tribes to determine the custody of Indian children, as a necessary guarantor of tribal integrity and on-going self-government, has been repeatedly expressed in judicial decisions.

The Indian Child Welfare Act was designed, in part, to end State incursions upon this fundamental right of tribes and to address abusive State practices resulting in the foster care and adoptive placement of extraordinary numbers of Indian children in non-Indian homes. In passing the ICWA, Congress intended to (1) strengthen tribes, and (2) protect the

best interests of Indian children by (a) ensuring tribal involvement in and, in most cases, control over decisions involving their children and (b) maximizing the opportunity for Indian children to maintain contacts with their tribes and extended families. An integral part of the statutory scheme was the codification of the rule, established by case law, that Indian tribes have exclusive jurisdiction over child custody proceedings involving Indian children residing or domiciled in the tribal community.

The Mississippi Supreme Court decision below contravenes both the basic jurisdictional principles historically expressed in case law, as well as the jurisdictional mandate of the Indian Child Welfare Act. It establishes a basis for the exercise of state jurisdiction based upon a novel theory of domicile, that, if

sustained, would deprive tribes of the ability to ensure the well-being of the children of the tribal community and would threaten Indian tribes with the unwarranted loss of untold numbers of children, a "resource...more vital to the continued existence and integrity of Indian tribes" than any other. 25 U.S.C. 1901(3). As a matter of federal law, the domicile of an Indian child should remain that of his or her reservation-domiciled parents until entry of a tribal court order that unambiguously results in changing the child's reservation domicile.

ARGUMENT

I. THE MISSISSIPPI BAND OF CHOCTAW INDIANS HAS EXCLUSIVE JURISDICTION TO DETERMINE THE CUSTODY OF THE CHILDREN INVOLVED IN THIS CASE.

A. Exclusive tribal jurisdiction over domestic relations, including the placement and adoption of children, has been recognized as a core component of Indian sovereignty.

Tribal exercise of jurisdiction over the domestic relations of tribal members who maintain tribal relations has been repeatedly recognized in a long series of cases dating from the 1800s to the present. In United States v. Quiver, 241 U.S. 602 (1916), this Court acknowledged that "personal and domestic relations of the Indians" have been regulated from "an early period... according to their tribal customs and laws." 241 U.S. at 603-604.

Federal and state courts had long recognized the jurisdiction and authority

of tribes over domestic relations matters. See, e.g., Yakima Joe v. To-is-lap, 191 F. 516, 517-518 (D. Oregon 1910) (upholding validity of a tribal marriage, on the grounds that "it is the policy of the law to treat Indians who retain their tribal relations...as separate and independent communities, with full and free authority to regulate and manage their own domestic affairs....[T]he Indians...[have] the power of regulating their internal and social relations, and....[are] not brought under the laws of the state."); Raymond v. Raymond, 83 F. 721 (8th Cir. 1897) (Cherokee Nation has exclusive jurisdiction over the divorce of a tribal member and a non-Indian who resided on the Cherokee reservation); Kobogum v. Jackson Iron Co., 76 Mich. 498, 43 N.W. 602, 605-606 (1889) (recognizing a polygamous marriage on the grounds that tribes have "full jurisdiction...over personal

relations" and that the State "cannot interfere with the validity of such marriages without subjecting them to rules of law which never bound them."); Davison v. Gibson, 56 F. 443, 445 (8th Cir. 1893) (holding that the rights of the parties, citizens and residents of the Creek Nation must be determined by the custom or law of the Creek Nation and that "domestic relations of the Indians...have never been regulated by the common law of England"); Earl v. Godley, 42 Minn. 361, 44 N.W. 254 (1890) (children of marriage recognized by Indian custom are legitimate); McBean v. McBean, 37 Or. 195, 61 P. 418, 420 (1900) (although finding that there was no proof that the couple had been married in accordance with tribal custom, the court acknowledged that "it is the adjudged policy of the law to treat the Indian tribes...as separate communities .... with full and free authority to manage

their own domestic affairs....Nor are they regarded as subject to the state laws.").

Even where the child was temporarily living off reservation, some early cases rejected State court jurisdiction over reservation Indians, implicitly recognizing that the child's domicile is determinative of jurisdiction. In re Lelah-puc-ka-chee, 98 F. 429 (N.D. Iowa 1899) and Peters v. Malin, 111 F. 244 (N.D. Iowa 1901), for example, held that the State court had no power to appoint a school administrator as guardian for an Indian girl, attending an off-reservation technical school, whose parents resided on the reservation. Such an appointment was of no legal force because the State had no "control over the domestic affairs or relations of these Indians, including the education of the children...[and] the control of the parents or relations over them...." Peters v. Malin, supra, 111 F.

at 253.

This doctrine which eschewed state jurisdiction over tribal Indians recognized that tribes had formal and informal mechanisms for resolving domestic issues within their tribal communities, including, as illustrated by In re Lelah-puc-ka-chee, supra, and Peters v. Malin, supra, issues relating to the care and custody of children. The Mississippi Band of Choctaw Indians, appellants in this case, were typical in this regard.

The Choctaw had a tradition of collectively taking care of all of the children of the tribe. A noted 19th century historian observed:

> The custom of adopting relatives or orphan children is very common. Even married people who have children, occasionally adopt one or more. They take an equal part with the other heirs and are sometimes even allotted the best share.

Claiborne, J. F.H., Mississippi as a Province, Territory and State (1964

reprint) at 523 (hereinafter "Claiborne").[1] There were "no orphan children unprovided for in their country." Cushman, H. B., History of the Choctaw, Chickasaw and Natchez Indians (1962 reprint) (hereinafter "Cushman") at 191.

> Never have there been found among the...Choctaws homeless and friendless orphan children thrown out to shift for themselves and left 'to root pig or die'. I have seen time and time again, in many families among the...Choctaws from one to four adopted orphan children....And one might live in a family of adopted orphans, and, unless told, he would not even suspect but that all the children were of the same parentage.

Id. at 400-401.

In fact, when the majority of Choctaw were forced to migrate to Oklahoma in the early 1830s, one of the first acts by the newly constituted Oklahoma Choctaw legislature in 1836 was "An act for the

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[1] This same historian observed that the Choctaw were "[v]ery tender towards their children, treating them generally with greater kindness than is customary with other people." Claiborne, supra, at 494.

appointment of guardians for Choctaw minors residing out of this Nation and who wish to remove and reside therein". Choctaw Nation, The Constitution and Laws of the Choctaw Nation, 1838 (1840).

Thus, the Choctaw have long handled their own child welfare matters in accordance with their law and custom, an exercise of authority recognized by early case law.[2] This authority has been repeatedly affirmed by contemporary courts.

In the oft-cited 1934 opinion, "Powers of Indian Tribes", the Interior Department solicitor stated that "[t]he Indian tribes have been accorded the widest possible latitude in regulating the domestic relations of their members." 55

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[2] Choctaw Nation jurisdiction over all civil matters was recognized by the United States government. See 7 Op. Atty.Gen. 175, 179-181 (1855), quoted in National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845, 854-855 (1985).

I.D. 14, 40 (1934). Consistent with this sovereign right, State courts have upheld exclusive tribal jurisdiction when domestic relations are involved. See, e.g., Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950) (divorce); Whyte v. District Court of Montezuma County, 140 Colo. 334, 346 P.2d 1012 (1959), cert. den., 363 U.S. 829 (1960) (divorce); State ex rel. Adams v. Superior Court, 57 Wash.2d 181, 356 P.2d 985 (1960) (child custody matter involving family domiciled on allotted land); In re Colwash, 57 Wash.2d 196, 356 P.2d 994 (1960) (dependency proceeding where child resident of reservation); In re Whiteshield, 124 N.W.2d 694 (N.D. 1963) (termination of parental rights of parents residing on the reservation).

A series of cases, in the years immediately preceding the enactment of the Indian Child Welfare Act, sustained

this principle and are of particular relevance to this case.

In Fisher v. District Court, 424 U.S. 382 (1976), this Court rejected state court jurisdiction over an adoption of an Indian child where the parties were members of the tribe and resided on the reservation. The Court held that

> State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves.

424 U.S. at 387-388. The Court found that the facts that the child had been born off of the reservation and that the parents had been married and divorced off the reservation were of "marginal relevance" in view of the "residence of the litigants". Id. at 390 n. 14. This Court has recognized the primacy of tribal jurisdiction over domestic relations in

many cases. See, e.g., United States v. Wheeler, 435 U.S. 313, 322 n. 18 (1978) ("unless limited by treaty or statute, a tribe has the power...to regulate domestic relations among tribe members.").

In addition, a number of lower federal and state courts upheld exclusive tribal jurisdiction to determine the custody of Indian children who resided off of the reservation but who were domiciled on the reservation. Wisconsin Potowatomies, etc. v. Houston, 393 F.Supp. 719 (W.D. Mich. 1973), involved the custody of children of an Indian father and non-Indian mother, both deceased. The children had been living off-reservation with their mother and a relative for about two months prior to the death of the parents. Before that time, the children had lived on the reservation with their parents for about a year and a half. Both children had been born off

reservation and lived, for a period of time, off the reservation. The court determined that the domicile of the children followed the parents and, rejecting the notion that physical presence is necessary to establish domicile, held that at the time of their death, the parents had been domiciled on the reservation -- thus vesting the tribe with the exclusive jurisdiction to determine the custody of the children. Id. at 731-732. The court stated:

> If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a sine qua non to the preservation of its identity.

Id. at 730.

In Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975), non-Indians who had been appointed the guardians of an Indian child in a tribal court proceeding sought permanent custody of the child in a

state court proceeding. Even though the child was residing in Maryland, the state Court of Appeals upheld the exclusive jurisdiction of the tribe based upon the reservation domicile of the child. The court found that (1) child-rearing is an "essential tribal relation", (2) it is "well settled" that the domicile of a minor is that of the parent, and (3) by changing their domicile, tribally-appointed guardians cannot shift the domicile of the child. 347 A.2d at 234, 238. See also Matter of Adoption of Buehl, 87 Wash.2d 649, 555 P.2d 1334 (1976) (notwithstanding that the child had been placed by the tribal court in foster care off of the reservation, the Blackfeet tribe and not the State court has jurisdiction over the adoption of a child whose mother is domiciled on the reservation).

Thus, court after court had recognized the broad scope of exclusive tribal jurisdiction over domestic relations in general and child custody matters specifically, even in many circumstances where the child was not physically located on the reservation. Notwithstanding these precedents, however, Congressional hearings in the 1970s revealed that many Indian children were wrongfully removed from their families and tribes by State authorities usurping tribal jurisdictional prerogatives. Accordingly, in 1978, Congress enacted the Indian Child Welfare Act, in significant part, to codify and expand tribal jurisdiction over Indian child custody determinations. See part B., infra.

B. The Indian Child Welfare Act, which codified and expanded upon previous jurisdictional case law, is a remedial act which recognizes the central role of Indian tribes in determining the best interests of Indian children, including the right to exclusive jurisdiction over children domiciled on the reservation.

The Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. 1901 et seq., was passed as a response to widespread evidence that abusive child welfare practices had caused thousands of Indian children to be wrongfully separated from their families, usually to be placed in non-Indian households or institutions. The report on ICWA of the House Interior and Insular Affairs Committee concluded that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." H. Rep. No. 1386, 95th Cong., 2d Sess. (July 24, 1978) at 9 (hereinafter "House Report"). It cited Association on American Indian

Affairs' (AAIA) studies, commissioned by Congress, which revealed that 25-35% of all Indian children were separated from their families and placed in foster homes, adoptive homes or institutions. Id.

The AAIA studies reported that Indian children were placed in foster care far more frequently than non-Indian children. This was true of all 19 states surveyed, with Indian placement rates ranging from 2.4 times the non-Indian rate in New Mexico to 22.4 times the non-Indian rate in South Dakota. "The Indian Child Welfare Act of 1977", Hearings on S. 1214 before the Select Committee on Indian Affairs, United States Senate, 95th Cong., 1st Sess. (August 4, 1977), at 539 (hereinafter "1977 Senate Hearing"). Likewise, all but one of the states surveyed had a greater rate of Indian children placed for adoption than was the case for non-Indians. The Indian adoption

rate in the most extreme case -- the State of Washington -- was 18.8 times the non-Indian adoption rate. Id. The AAIA study also found that most of the Indian children placed outside of their homes were placed with non-Indian families. The percentage of Indian children placed in non-Indian foster homes in those states that reported this information ranged from 53% in Wyoming to 97% in New York; the percentage of Indian children placed in non-Indian adoptive homes ranged from 69% in Washington to 97% in Minnesota. Id. at 537-603.

The House Report concluded that these placement rates were a result of several factors:

> (1) ...many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.
>
> (2) The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law....Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of the waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments.
>
> (3) ...agencies established to place children have an incentive to find children to place.
>
> (4) ...effects of our national paternalism...alienate some Indian parents from their society....

House Report, supra, at 10-12

Congress recognized that these statistics also reflected the fact that "[g]enerally, there are no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agencies." Statement of Congressman Robert Lagomarsino, minority co-sponsor of the Indian Child Welfare Act, 124 Cong. Rec. H 12849 (Oct. 14, 1978).

In addition, Congress found that improper state court actions played an important role in creating this situation. The statutory findings explicitly note that State "judicial bodies...have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5). Likewise, the legislative history is filled with criticism of state court proceedings involving the placement of Indian children in foster and adoptive homes. Congressman Morris Udall, sponsor of the Indian Child Welfare Act, in a letter to Assistant Attorney General Patricia Wald reprinted as part of the legislative history of the ICWA, asserted that "state courts and agencies and their procedures share a large part of the responsibility for this crisis." 124 Cong. Rec. H 12850 (Oct. 14, 1978). See also

House Report, supra, at 11 ("The abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life.").

Congress found that the extraordinary and unwarranted rate of placement -- resulting from historical state disregard for tribal integrity and culture and the frequent exclusion of tribes from child custody decision-making was not in the best interests of Indian tribes, families and children. See 25 U.S.C. 1901, 1902.

In the case of tribes, Congress explicitly found "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children...." 25 U.S.C. 1901(3). Congressman Udall expanded upon this finding both in his statement accompanying the introduction of the Indian Child Welfare Act and in the floor debate prior to passage:

> We could not more effectively and completely destroy an Indian tribe than by depriving them of their children.

124 Cong. Rec. H 3560 (May 3, 1978).

> Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy.

124 Cong. Rec. H 12849 (Oct. 14, 1978).

Courts have underscored the importance of this Congressional finding. In Matter of M.E.M., 635 P.2d 1313, 1316 (Mont. 1981), the Montana Supreme Court stated:

> The Indian Child Welfare Act of 1978 was passed by Congress in response to a significant threat to the integrity of Indian cultures in this country. The Act represents Congressional recognition of the concomitant cultural interests of Indian tribes and Indian children; interests fundamental to the perpetuation and preservation of their mutual and valuable heritage....Preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture. Absent the next generation, any culture is lost and necessarily

> relegated, at best, to anthropological examination and categorization.

See also Matter of Appeal in Pima County Juvenile Action No. S-903, 130 Ariz. 202, 635 P.2d 187, 188-189 (Ariz. App. 1981), cert. den. sub. nom. Catholic Social Services of Tucson v. P.C., 455 U.S. 1007 (1982).

Congress also determined that the best interests of Indian children are served by maintaining them in an Indian environment whenever possible, preferably within the tribal community and within their extended families. See Matter of Appeal in Pima County, supra, 635 P.2d at 189 ("The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.").

Testimony at Congressional hearings was replete with examples of Indian children placed in non-Indian homes and

later suffering from debilitating identity crises when they reached adolescence. This phenomenon occurred even when the children had few memories of living as part of an Indian community. As the Senate Select Committee on Indian Affairs noted in its report on the ICWA: "Removal of Indians from Indian society has serious long-and short-term effects...for the individual child ... who may suffer untold social and psychological consequences." S. Rep. 597, 95th Cong. 1st Sess. (Nov. 3, 1977) at 43. (hereinafter "Senate Report"). For example, in testimony submitted to the Senate Select Committee on Indian Affairs by the American Academy of Child Psychiatry, it was stated that:

> There is much clinical evidence to suggest that these Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough they are cared for by devoted and well intentioned foster or adoptive parents. Nonetheless, particularly

> in adolescence, they are subject to ethnic confusion and a pervasive sense of abandonment with its attendant multiple ramifications.

1977 Senate Hearing, supra, at 114.

At an earlier hearing, Dr. Joseph Westermeyer of the Department of Psychiatry at the University of Minnesota testified similarly concerning patients that he had treated:

> ...[T]hey were raised with a white cultural and social identity. They are raised in a white home. They attended, predominantly white schools, and in almost all cases, attended a church that was predominantly white, and really came to understand very little about Indian culture, Indian behavior, and had virtually no viable Indian identity. They can recall such things as seeing cowboys and Indians on TV and feeling that Indians were a historical figure but were not a viable contemporary social group. Then during adolescence, they found that society was not to grant them the white identity that they had. They began to find this out in a number of ways. For example, a universal experience was that when they began to date white children, the parents of the white youngsters were against this, and there were pressures among white children from the parents not to date these Indian children....The other experience was

> derogatory name calling in relation to their racial identity....[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess.

"Indian Child Welfare Program", Hearings on problems that American Indian families face in raising their children and how these problems are affected by Federal action or inaction before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, United States Senate, 93rd Cong., 2d Sess. (April 8-9, 1974) at 46 (hereinafter "1974 Senate Hearing"). See also findings of Congress' American Indian Policy Review Commission reprinted in the Senate Report, supra, at 52 ("Removal of Indian children from their cultural setting seriously impacts on long-term tribal survival and has damaging social and psychological impact on many individual Indian children"); Comments of Senator James Abourezk, 1977 Senate Hearings, supra, at 2 ("Officials

seemingly would rather place Indian children in non-Indian settings where their Indian culture, their Indian traditions and, in general, their entire Indian way of life is smothered....This course can only weaken rather than strengthen the Indian child...."); Testimony of Louis La Rose, chairman of the Winnebago Tribe, Senate Report, supra, at 43; Colloquy between Senator James Abourezk and Bertram E. Hirsch of the Association on American Indian Affairs, 1977 Senate Hearings, supra, at 77-78.

An emphasis on maintaining the child's connection with his or her specific tribe is also evident in the legislative history of ICWA. See, e.g., Statement by Congressman Lagomarsino, 124 Cong. Rec. H12849 (Oct. 14, 1978) ("[S]eparation of an Indian child from his family leads to the loss of his right to share in the cultural and property

benefits of membership in his tribe."); Testimony of Dr. James Shore, 1974 Senate Hearings, supra, at 101-114. See also 25 U.S.C. 1917 (providing a means by which Indian children adopted under State law can reestablish their tribal relationship).

There was also substantial testimony regarding the importance to Indian children of the extended family relationship. As the House Report explained:

> [T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family.

House Report, supra, at 10.

> The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing.

House Report, supra, at 20. Senator

Abourezk, principal sponsor of the Indian Child Welfare Act in the Senate, addressed the same cultural tradition in the Senate hearing which led to the introduction of the Act:

> We've had testimony here that in Indian communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or friend will take that child in. It's the extended family concept.[3]

1974 Senate Hearing, supra, at 473. See

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[3] This family organization system was also a defining characteristic of traditional Choctaw society. The responsibility for raising a Choctaw child was shared by many of the child's relatives. In fact, under Choctaw custom the mother's male relatives had custodial rights and responsibilities in regard to that child superior to that of the father. Claiborne, supra, at 517. A child's maternal uncle, or if he were dead, another male relative, and not the father, would be consulted in all that concerned the child. Id; Cushman, supra, at 87. The Reverend Israel Folsom, a Choctaw, described it thus: "In the domestic government the oldest brother or uncle was the head; the parents being required merely to assist in the exercise of this duty by their advice and example." Cushman, supra, at 300. See also Swanton, John R., Source Material for the Social

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also, e. g., Testimony of Faye La Pointe for the Puyallup Tribe in "Indian Child Welfare Act of 1978", Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands, House Committee on Interior and Insular Affairs, 95th Cong., 2nd Sess. (February 9 and March 9, 1978)

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3 -continued-
and Ceremonial Life of the Choctaw Indians, Smithsonian Bulletin No. 103 (1931) at 77 (quoting from diary of Alfred Wright, missionary, who stated that the "[w]oman's brothers are considered the natural guardians of the child"). If the mother and father separated, custom dictated that the child would be adopted by the maternal grandfather. Claiborne, supra, at 521.

The Choctaw language, still widely spoken, also reflects the importance of extended family relationships in Choctaw culture. The words for mother and father are extended to the father's sisters and mother's brother respectively, as well as to sons of paternal great uncles, grandsons of paternal great-great uncles, uncles by marriage on the mother's side, daughters of maternal great aunts, granddaughters of maternal great-great aunts and a number of other relatives as well. Swanton, supra, at 87. The words for brother and sister are likewise extended to the children of the child's paternal uncle or maternal aunt and a variety of other cousins as well. Id. at 88.

at 204 ("The extended family still exists in Indian country, it means living together, loving together, crying together, sharing all things and never having to worry about being alone."); Testimony of Dr. Robert Bergman, Chief, Mental Health Program, Indian Health Service, 1974 Senate Hearing, supra, at 130.[4]

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4 Courts have also recognized the strength and importance of the Indian extended family. See, e.g., Arizona State Dept. of Public Welfare v. HEW, 449 F.2d 456, 477 (9th Cir. 1971), cert den., 405 U.S. 919 (1972) (in the context of evaluating a public assistance plan, the court noted that "the evidence showed...a common, if not the predominant cultural pattern among ...Indians in Arizona is the 'extended family'. Under this cultural system, it is common for children to be sent to live for short periods of time with relatives."); Wisconsin Potowatomies, etc. v. Houston, supra, 393 F. Supp. at 726, 733-734 (noting testimony that had been presented concerning the kinship community and role of grandparents and great-uncles in raising children and finding that the great-uncle had attempted, pursuant to tribal custom, to obtain custody of the children in question). Cf. Moore v. City of East Cleveland, 431 U.S. 494, 508 -continued-

For all of the foregoing reasons, Congress established "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture...." 25 U.S.C. 1902. These standards are designed "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families...." Id. In enacting these standards, Congress acted pursuant to its trust responsibility to protect Indian children and preserve Indian tribes. 25 U.S.C. 1901(2),(3).

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4 -continued-
(1977) (Brennan, J., conc.) ("[T]he 'nuclear family' is the pattern so often found in much of white suburbia....The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The 'extended family'...remains ...a prominent pattern...for large numbers of the poor and deprived minorities of our society.").

Thus, under the Act, extended family members are the most preferred foster care and adoptive placement, followed by placements which maintain the child's relationship with the tribe. 25 U.S.C. 1915(a),(b). ICWA defines extended family with deference to tribal law and custom. 25 U.S.C. 1903(2).

In addition, and most significantly for the purposes of this case, the ICWA emphasizes tribal involvement in and, wherever possible, control of decisions involving the welfare of Indian children. Thus, inter alia, tribes have exclusive jurisdiction over a child custody proceeding where a child is resident or domiciled on the reservation, 25 U.S.C. 1911(a), concurrent (indeed presumptive) jurisdiction over such proceedings if the child is resident and domiciled off reservation, 25 U.S.C. 1911(b), must receive notice of all involuntary

proceedings in state court, 25 U.S.C. 1912(a), may intervene in voluntary and involuntary proceedings in State court, 25 U.S.C. 1911(c), and may establish foster care or adoptive placement preferences which supersede otherwise applicable ICWA preferences, 25 U.S.C. 1915(c). Even when a State court or agency legitimately exercises authority to place an Indian child, it must apply "the social and cultural standards of the Indian community in which the parents and extended family resides or...maintain social and cultural ties." 25 U.S.C. 1915(d). As Senator Abourezk explained, "the Indian community itself...know(s) much better what is in their best interest than we do..." 1974 Senate Hearing, supra, at 473.

This tribal involvement and control ensures that decisions about the custody of Indian children will consider all of the diverse and unique factors which should be

part of any determination of an Indian child's best interest. In addition, it ensures that the child's ties with his tribe and extended family will be preserved unless there are compelling reasons to sever those ties. At its core, this was the purpose of ICWA.

The Mississippi Supreme Court decision is a blatant intrusion into the protected realm of tribal decision-making in regard to the adoption of Indian children -- decision-making powers that are essential for the tribe's continuing existence. The decision reflects the continuing State "fail[ure] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families". 25 U.S.C. 1901(5). For these reasons, as fully more explained in part C, infra, this court should reverse the decision of the Mississippi Supreme Court.

C. The intent and purpose of the **Indian Child Welfare Act, as well as the underlying principles of Indian sovereignty over domestic relations matters expounded in preexisting case law, can be fulfilled only if the Mississippi Band of Choctaw Indians has exclusive jurisdiction over the adoption of B.B. and G.B.**

The question presented in this case is whether a child born off reservation to parents who are resident and domiciled on the reservation is subject to the exclusive jurisdiction of the tribal court. 25 U.S.C. 1911(a) provides that "an Indian tribe shall have jurisdiction exclusive as to any state over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe ...." "Child custody proceeding" is defined in 25 U.S.C. 1903(1) (ii) and (iv), respectively, to include "any action resulting in the termination of the parent-child relationship" and "the permanent placement

of an Indian child for adoption, including any action resulting in a final decree of adoption." Thus, if B.B. and G.B. are domiciled on the reservation, federal law is unambiguous; the state of Mississippi had no jurisdiction to decree their adoption.

The court below developed a new and unique definition of domicile, requiring the physical presence of a child as a prerequisite to a finding of reservation domicile. Matter of B.B., 511 So.2d 918, 921 (Miss. Sup. Ct. 1987), prob. juris. post. sub. nom. Mississippi Band of Choctaw Indians v. Holyfield, __ U.S.__, 108 S.Ct.1993 (1988). This interpretation contradicts the generally followed rule, viz., "At birth, an illegitimate child acquires the domicile of his or her mother." See Restatement (Second) of Conflict of Laws, sec. 22, comment c (1971). Indeed, the lower court decision

ignored preexisting Mississippi precedent holding that a minor's domicile is that of his parents. See, e.g., In re Guardianship of Watson, 317 So.2d 30, 32 (Miss. Sup. Ct. 1975). Instead, the court below devised a result-dictated definition of domicile solely to uphold the adoption of G.B. and B.B. The state court sanctioned State exercise of jurisdiction simply because tribal members who were resident and domiciled on the reservation crossed the reservation border, relinquished custody to a non-Indian couple and asked the State court to exercise jurisdiction. No alternatives that would keep the children within the tribal community were even considered. In its willingness to distort legal doctrine to achieve its desired end, the Mississippi Supreme Court followed in the footsteps of those courts that Congressman Udall characterized as "shar[ing] a large

part of the responsibility for this crisis."[5] 124 Cong. Rec. H12850 (Oct. 14, 1978). See pp. 28-29, supra.

The holding below thwarts the goals of ICWA, namely, (1) the recognition of the essential decision-making role of tribes through the exercise of exclusive jurisdiction over child custody proceedings involving reservation children, and (2) the maintenance of children within their extended family and culture whenever possible.

As discussed at pp. 41-43, supra, the tribal role in ICWA is central. The lower court decision, by permitting subversion

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[5] The implication of the decision below that the ICWA does not apply because the children are off of the reservation, Matter of B.B., supra, 511 So.2d at 921, is illustrative of the willingness of the Mississippi Supreme Court to ignore any aspect of ICWA that is not in accord with its own predisposition. See, e.g., 25 U.S.C. 1911(b) which clearly provides for transfer to the tribal court of cases involving Indian children resident and domiciled off the reservation.

of tribal jurisdiction on a case-by-case basis and at parental option, undermines fundamental rights which inhere in tribal sovereignty. See pp. 11-20, supra. See also, DeCoteau v. District County Court, 420 U.S. 425, 465 n.8 (1975) (Douglas, J., dissenting) (the question of a child's welfare "involves a problem of domestic relations which goes to the heart of tribal self-government"). It elevates the choice of a parent who has decided to permanently terminate the parental relationship with the child over the social and compelling governmental parens patriae interest of tribes in maintaining a relationship with the child. See Senate Report, supra, at 51. The untenability of such a rule is apparent especially when, as here, parents continue to enjoy the rights and benefits of tribal membership and residence but are accorded unfettered license to deny those rights and benefits

to their children.

In addition, as discussed supra, pp. 31-39, Congress was very concerned about maintaining the child's relationship with the extended family and tribe. See Matter of Appeal in Pima County, supra, 635 P.2d at 189; 25 U.S.C. 1902; 25 U.S.C. 1915(a), (b). In most Indian cultures (including the Choctaw), the child's relationships with extended family and tribe are neither subordinate to nor less important than the biological parent/child relationship and, in fact, under tribal law and custom, extended family members often have specific child-rearing responsibilities and duties. See pp. 36-41, supra. To entirely defer to the jurisdictional preference of the parent relinquishing parental rights, as suggested by the Mississippi Supreme Court, would give that parent a power that he or she would not ordinarily have in

most Indian societies -- namely, the power to permanently sever the child's relationship with extended family, clan and tribe. To do so makes primary the personal needs of a relinquishing parent at the expense of the best interests of the Indian child as determined by Congress. See pp. 29-39, supra.

The intent of Congress is realized, however, if 25 U.S.C. 1911(a), is properly applied. Section 1911(a) was directly based upon preexisting case law. According to the House Report, supra, at 21, Section 1911(a) was intended to "confirm" the jurisdictional holdings of Wisconsin Potowatomies etc. v. Houston, supra, Wakefield v. Little Light, supra, and Matter of the Adoption of Buehl (also known as Duckhead v. Anderson), supra. In each of these cases, the court had found that the child's domicile was that of his or her parents. See pp. 20-23, supra.

Thus, in enacting 25 U.S.C. 1911(a), Congress intended to ensure that the children of tribal members resident or domiciled within the tribal community would be subject to tribal law and not state law. See Matter of Adoption of Halloway, 732 P.2d 962, 968 (Utah 1986) (off-reservation abandonment of child by reservation-domiciled Indian mother for the purpose of shifting child's domicile in order to facilitate state court adoption by non-Indians "conflicts with and undermines the operative scheme established by subsections 101(a) [25 U.S.C. 1911(a)] and 103(a) [25 U.S.C. 1913(a)] to deal with children of domiciliaries of the reservation...." Emphasis added). This construction most advances the basic assumption of the Indian Child Welfare Act that it is generally in the best interests of Indian children to protect their relationship

with the tribe and extended family. It ensures that children born to tribal members who are part of a tribal community will only be separated from that community when the tribe, as parens patriae, determines that such a separation is in the best interests of the child. As this court recognized in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978), "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians". Accord, Iowa Mutual Ins. Co. v. LaPlante,__ U.S.__,107 S.Ct. 971(1987).

In circumstances similar to those here, the New Mexico Court of Appeals and the Utah Supreme Court found that state courts lacked jurisdiction over the adoption of Indian children.

In Matter of Adoption of Baby

Child, 102 N.M. 735, 700 P.2d 198 (N.M. App. 1985), the mother of an illegitimate Pueblo child attempted to place her child for adoption off the reservation. The New Mexico Court of Appeals ruled that, because of the mother's reservation domicile, state courts had no subject matter jurisdiction over the adoption.[6]

In Matter of Adoption of Halloway, supra, a Navajo child was placed off the reservation in a non-Indian household. The child's mother was resident and domiciled on the reservation. The Utah Supreme Court held that state courts could not exercise jurisdiction over the child since he had been "removed from the

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6 This Court postponed probable jurisdiction over an earlier appeal in this case that raised the identical jurisdiction issue decided in Matter of Adoption of Baby Child, supra, but dismissed the appeal following the decision in Matter of Adoption of Baby Child. Pino v. District Court, etc., prob. juris. post., 471 U.S. 1014, app. dism., 472 U.S. 1001 (1985).

reservation and placed for adoption with non-Indians with the clear intent of circumventing the right granted the tribe by the ICWA to exclusive control over [the child's] custody." 732 P.2d. at 968. The parties had filed in state court in an attempt to find a court that might be "more receptive than a tribal court to ...[the child's] placement with non-Indian parents. Yet this receptivity of the non-Indian forum to non-Indian placement of an Indian child is precisely one of the evils at which the ICWA was aimed." Id. at 969.

The Utah Supreme Court concluded that although "questions of domicile [under ICWA] were left to be decided under state law....because Congress saw no apparent conflict between state domicile law and the purposes of the ICWA," state domicile law cannot be used to affirm state court jurisdiction "where state law...subtleties bring it into

conflict with the ICWA in ways that Congress apparently did not foresee."[7] Id. at 967.

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[7] As discussed in Halloway, the "Guidelines for State Courts; Indian Child Custody Proceedings" issued by the Bureau of Indian Affairs indicate that State domicile law may be applied in interpreting the ICWA because "[t]here is no indication that these state law definitions tend to undermine in any way the purposes of the Act." 44 Fed. Reg. 67583, 67585 (1979). As recognized in Halloway, however, where State domicile law "undermines" ICWA, its application is inappropriate.

Moreover, the Guidelines are not binding upon State courts. Id. at 67584. A forceful argument can be made that tribal domicile law and custom, and not state domicile law, should be dispositive in determining whether B.B. and G.B. are "domiciled within the [Mississippi Choctaw] reservation." 25 U.S.C. 1911(a). Deference to tribal law is an integral part of the ICWA. See 25 U.S.C. 1915 (d) (foster care and adoptive preference requirements determined by utilizing the prevailing social and cultural standards of the Indian community); 25 U.S.C. 1915(c) (authorizing tribes to set their own placement preferences); 25 U.S.C. 1903(2) ("extended family member" defined in the first instance by tribal law and custom); 25 U.S.C. 1903(6) (same in case of definition of "Indian custodian"); 25 U.S.C. 1903(12) (tribal courts include courts operated under tribal "code or -continued-

This Court has always held that Indian statutes are to be construed liberally for the benefit of Indian people and tribes. Ambiguous language is to be construed in favor of the Indians. See, e.g., Bryan v. Itasca County, 426 U.S. 373, 392 (1976). It is vital that this Court apply the Indian Child Welfare Act to achieve its remedial and salutary purposes. It can do so only by holding that ICWA and preexisting case law require that tribes have exclusive jurisdiction over the children of tribal members who are resident or domiciled on the reservation. As a matter of federal law,

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7 -continued-

custom"); 25 U.S.C. 1911(d) (State courts required to give full faith and credit to the "public acts, records and judicial proceedings of any Indian tribe...."). In other contexts, this Court has recognized tribal court responsibility to address questions concerning the interaction between tribal and federal law. See Santa Clara Pueblo v. Martinez, supra 436 U.S. at 65-66.

this holding should be based on the premise that an Indian child's domicile remains that of his or her reservation-domiciled parents until entry of a tribal court order that results in an unambiguous alteration of the child's reservation domicile.[8]

If the decision below is not reversed, the potential deleterious impact on all tribes would be enormous. Such a result would create a huge loophole in the coverage of the ICWA. Many thousands of Indian children of reservation domiciled parents are born off of the reservation. Therefore, the Mississippi version of the law of domicile, if sanctioned by this Court, would likely

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8 An Indian child's reservation domicile may be changed whenever a tribal court with exclusive jurisdiction enters an order terminating the parent-child relationship and the child is subsequently placed off-reservation in the absence of any continuing tribal court wardship. 25 U.S.C. 1911(a)

subject a large number of children who are part of the tribal community to state court jurisdiction contrary to the intent of the ICWA.

Moreover, in view of the great demand for adoptable babies in 1988 society, see, e.g., Matter of Baby M, 109 N.J. 396, 537 A.2d 1227, 1249 (1988) (shortage of adoptable babies gives rise to surrogate parenting arrangements), the creation of an "option" to pursue the adoption of such children in state courts will likely lead to increased pressures on young Indian parents to consent to the adoption of their children outside of the tribal community.[9] As Congress noted in enacting the ICWA, one of the factors leading to

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9 The House Report noted that many "voluntary" consents are not truly voluntary. House Report, supra, at 11. See also In the Matter of an Adoption of an Indian Child, __ N.J. __, __ A.2d __ (slip. op. at 16) (N.J. Supreme Court, July 7, 1988). Parents, especially young or indigent parents, may relinquish rights -continued-

the high placement rates of Indian children was that "...agencies established to place children have an incentive to find children to place." House Report, supra, at 11.

Reversal of the judgment below and a correct application of 25 U.S.C. 1911(a) is imperative if the best interests of Indian children, as defined by Congress (25 U.S.C. 1902, 1915), are to be assured and the national commitment to and guarantee of tribal integrity and survival is to have any meaning. See 25 U.S.C. 1901(2),(3), 1902.

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9 -continued-
to a child because of pressure, a sense of inadequacy as a parent, or because of insurmountable obstacles to an adequate family life perceived by the parent. Short-term parental inability to care for a child may cause long-term harm to the tribe and the child. As Congress recognized, tribal control over the placement (if necessary) of the child, especially where the parents are resident and domiciled on the reservation, is an essential protection against the coercion of Indian parents and improvident actions by such parents that are contrary to the child's best interests.

CONCLUSION

For all of these reasons, the Indian Child Welfare Act should be construed, together with preexisting case law, to affirm the exclusive jurisdiction of the Mississippi Band of Choctaw Indians to determine the best interests of B.B. and G.B. The Choctaw tribal court and other tribal courts are best able to weigh all of the necessary factors to determine the best interests of Indian children. This Court must apply the ICWA and preexisting case law to recognize tribal authority to regulate the domestic affairs of all tribal members who are part of the tribal community, including tribal authority to determine the custody of the children of those members. The Mississippi Supreme Court decision should be reversed.

Respectfully submitted,

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No. 87-980

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MISSISSIPPI BAND OF CHOCTAW INDIANS,

APPELLANT,

v.

ORREY CURTISS HOLYFIELD, ET UX., J.B.,

NATURAL MOTHER, AND W.J., NATURAL FATHER,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF

MISSISSIPPI

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE MENOMINEE INDIAN TRIBE OF WISCONSIN

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IN THE SUPREME COURT OF THE UNITED STATES

No. 87-980

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MISSISSIPPI BAND OF CHOCTAW INDIANS,

Appellant,

v.

ORREY CURTISS HOLYFIELD, et ux., J.B.,

NATURAL MOTHER, and W.J., NATURAL FATHER,

Appellees.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Menominee Tribe of Wisconsin respectfully moves this court for leave to file the accompanying brief in this case as amicus curiae. Oral consent to file was granted by counsel for the appellant by telephone on July 25, 1988. Counsel for appellee orally objected by telephone on July 25, 1988.

The Menominee Tribe of Wisconsin is a

federally recognized Indian tribe, exercising powers of self-government pursuant to the Menominee Restoration Act, P.L. 93-197, and having a reservation located in Wisconsin. It has an interest in this case in that in the course of delivering governmental services to tribal members and their children, it has observed opportunities and attempts to thwart tribal participation in decisions affecting the future of infant tribal members born off the reservation, despite the intent of the Indian Child Welfare Act.

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Appellees.

Brief of Menominee Indian Tribe of Wisconsin, Amicus Curiae.

STATEMENT OF INTEREST

The Menominee Tribe of Wisconsin is a federally recognized Indian Tribe having a reservation located in the State of Wisconsin. The tribe exercises governmental jurisdiction, including court jurisdiction over member children and and their families within the reservation in matters of child welfare, domestic relations, family services, delinquency, guardianship, and court-ordered protection and services. The tribal court regularly exercises jurisdiction in matters of child welfare based upon the domicile or residence of the subject child or the child's member parent. The Tribe considers tribal members who are either residents or domiciliaries of the reservation to be entitled to the protection and services of the tribal courts.

The Menominee Tribe operates a comprehensive social services program for tribal members living on or near the

reservation. Among those members have been women either pregnant or with infants whom they would prefer to place for adoption, but who for various reasons have been reluctant to seek assistance from the tribal social services department. They have therefore sought the assistance of county, state, or independent agencies in placing their children.

The Menominee Tribe has entered into an adoption services agreement with the State of Wisconsin. Pursuant to Wisconsin law, guardianship of a child for whom parental rights have been terminated by action of a county agency is transferred to the State in most cases pursuant to Wis. Stat. sec. 48.427(3)(a)(4). The agreement then assures that the State will work with the Menominee Tribe in planning and adoption services for the child.

The agreement, however, does not apply to post-termination guardianship that is

transferred to an independent child welfare agency pursuant to Wis. Stat., sec. 48.427(3)(a)(3). A strong potential exists, as in the instant case, that a mother who is a reservation domiciliary can deliver a child off the Menominee reservation, and immediately relinquish custody of the child to foster parents through an independent child welfare agency welfare agency. By asserting the position argued by appellees, the agency can boost the child out of tribal exclusive jurisdiction pursuant to section 1911(a) of the Act, and subsequently assert the voluntary proceedings provisions of the Act, section 1913, to circumvent the notice provisions of section 1912(a).

A decision in favor of the appellees in the instant case will encourage independent adoption agencies to once again look to the Indian reservations for children who may be available for non-Indian adoption. A decision in favor of the appellees in this case will

increase the probability of the Menominee Tribe not receiving due notice of proceedings for termination of parental rights or adoption through independent agencies, and will increase the numbers of tribal children cut off from the Menominee Tribe, their extended families, and their birthright.

ARGUMENT

For purposes of the Indian Child Welfare Act, residence and domicile of an Indian child should be defined by application of federal common law.

In the exercise of its plenary power over Indian tribes, Congress enacted the child Welfare Act of 1978, P.L. 95-608, in part codifying existing case law that recognized the overwhelming interest of a tribe in the domestic relations of its members who are reservation domiciliaries. Wisconsin Band of Potawatomies v. Houston, 393 F. Supp. 719 (D.W.D. Mich. 1973); Wakefield v. Little Light, 347 A.2d 228 (Md. App. 1975). Matter of Greybull, 543 P.2d. 1079 (Or. App. 1975); Matter of Adoption of Buehl, 555 P.2d 1334 (Wash. 1976). This pre-Act line of cases recognizes exclusive jurisdiction of a tribe to determine the care and custody of tribal

children only if it is established that a child is a reservation domiciliary.

The Act does not define the law by which domicile or residence of an Indian child are to be measured, although Bureau of Indian Affairs commentary to the published guidelines for state courts stated that "definitions (of domicile or residence) were not included (in the Guidelines) because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act." Guidelines for State Courts in Indian Child Custody Proceedings, 44 Fed. Register 67584, 67585 (November 26, 1979)

Under general canons of construction, unless there is plain indication of contrary intent, it is not to be assumed that Congress intends to make application of its statutes dependent on State law. N.L.R.B. v. Randolph Electric Membership Corp., 343 F.2d 60, 62-63 (4th Cir. 1965). This is to avoid impediments

to application of national legislation which might arise if state law were to control. Jerome v. United States, 318 U.S. 101 (1943). In cases involving determination of domicile of a minor for purposes of diversity, federal courts have used the federal common law, looking to the Restatement of the Law of Conflict of Laws, that a child retains the domicile last possessed by the parents, in accordance with Restatement of the Law of Conflict of Laws, sec. 14 ; sec. 22, comment c, d, e, h.

The four cases decided prior to enactment of the Indian Child Welfare Act and cited above, as well as cases decided in state courts since the Act have all analyzed the question of a child's domicile consistent with the provisions of the Restatement. Matter of Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187 (Ariz. App. 1981), cert. den. 455 U.S. 1007 (1982); Matter of Adoption of a Baby Child, 700 P.2d 198 (N.M. App.

1985); In the matter of the Adoption of Jeremiah Halloway, 732 P.2d 962 (Utah Sup. Ct. 1986).

The Indian Child Welfare Act's purpose was to recognize and preserve the interest of Indian tribes in their children and to assure that Indian tribes remain a vital part of the tribal domestic relations equation. Unlike states and municipalities, Indian tribes must rely on birth and continuing affiliation to maintain their communities. Therefore, Congress created minimum federal safeguards to secure not so much the political interest of a tribe in its minor constituents, but the continuing viability of the tribal community.

Unification of the definitions under federal common law is consistent with the federal purpose in enacting the law. As recognized in Jeremiah Halloway, supra,

> (T)here certainly is nothing in the ICWA or its legislative history to suggest that state law controls if, in application, its subtleties bring it into conflict with the ICWA in ways that Congress apparently did not foresee.

Jeremiah Halloway, supra at 967.

Such analysis in Wisconsin courts would most likely follow these decisions and the Restatement, as the Wisconsin Supreme Court has already held that the domicile of a child is that of the child's parent for purposes of determination of eligibility for economic assistance. Town of Carlton v. Department of Public Welfare, 271 Wis. 465, 74 N.W.2d 340 (1956). In that case, the domicile of two incompetents was analyzed in accordance with the Restatement, which resulted in a holding that the two incompetents retained their deceased father's last domicile. That domicile continued even after establishment of a guardianship, until a successor guardian took recognizable and affirmative action that evinced an intent to change the wards' domicile.

A brief and loosely drawn discussion of the term "domicile" as it relates to the Act is also set forth at 70 Wis. Op. Atty. Gen. 237, 244 (1981), which combines a Restatement

analysis with a "significant contacts" analysis, without discussing the direction of the Town of Carlton case. This mixing of jurisdictional rules with forum non conveniens considerations demonstrates the potential for confusion in the absence of a clear adoption of a federal common law definition of domicile and residence.

SUMMARY OF ARGUMENT

The instant case does not present, as claimed by the Mississippi Supreme Court, the issue of whether domicile of a child is fixed in utero, but rather it begs application of previously recognized federal common law, consistent with the intent of the Act: that domicile is fixed, in default of other actions and intent, by the domiciliary status of the last custodial parent. Here there was apparently no provision for off-reservation guardianship or any other action that evinces intent to change the child's domicile - a

course of action that was likely open to the parents, the proposed adoptive parents, and their counsel. The power of the Holyfields to effect a change in the subect child's domicile is at best inchoate, as their authority does not ripen until the adoption is judicially approved. Without such affirmative acts by those vested with the authority to make choices on behalf of the child, the rule of law lays domicile within the tribal reservation. Accordingly, the petition for adoption was void for lack of jurisdiction, and the decision of the Mississippi Supreme Court should be reversed.

Dated this ____ day of July, 1988.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 87-980

October Term, 1987

MISSISSIPPI BAND OF CHOCTAW INDIANS,

Appellant,

v.

ORREY CURTISS HOLYFIELD, et ux., J.B.,

NATURAL MOTHER, and W.J., NATURAL FATHER,

Appellees.

ENTRY OF APPEARANCE

The Clerk will enter my appearance as Counsel for the Menominee Indian Tribe of Wisconsin, who in this court is

Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States.

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I am the person to be notified at the foregoing address.

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PROOF OF SERVICE

I, Kathryn L. Tierney, counsel of record for the Menominee Indian Tribe of Wisconsin, amicus curiae, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of July, 1988, I served copies of the foregoing Motion for Leave to File Amicus Curiae Brief and Amicus Curiae Brief on counsel of record for the parties by depositing copies in a duly

addressed envelope, with first class postage prepaid, to:

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